TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 122.

HENRY DREHMAN, PLAINTIFF IN ERROR,

vs.

CHARLES G. STIFEL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

FILED NOVEMBER 1, 1867.

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UNITED STATES OF AMERICA, *ss:*

[SEAL.] The President of the United States to the honorable the judges of the supreme court of the State of Missouri, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court before you, at the March term, 1867, between Henry Drehman, appellant, and Charles G. Stifel, appellee, a manifest error hath happened to the great damage of the said Henry Drehman, as by his complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of December next, in the said Supreme Court to be then and there held; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and custom of the United States, should be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court, this eighth of May, in the year of our Lord one thousand eight hundred and sixty-seven.

Issued at office in the city of St. Louis, with the seal of the circuit court of the United States for the district of Missouri, dated as aforesaid.

BEN. F. HICKMAN,
Clerk C. C. U. S. Missouri District.

Allowed by

DAVID WAGNER,
Presiding Judge Sup. Ct. Mo.

[50-cent U. S. revenue stamp.]

STATE OF MISSOURI, *ss:*

I, O. T. Fishback, clerk of the supreme court held at St. Louis, of the State of Missouri, in obedience to the mandate of the within writ, certify & herewith transmit to the honorable Supreme Court of the United States at Washington a full, true, and complete transcript of the record and proceedings in the within-entitled cause, as fully as the same remains of record and on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at office in the city of St. Louis, this first day of August, A. D. eighteen hundred and sixty-seven.

[SEAL.] O. T. FISHBACK, *Clerk*,
Per E. P. McCARTY, *Dep.*

B The United States of America to Charles G. Stifel, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Missouri, wherein Henry Drehman is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable David Wagner, chief justice of the supreme court of the State of Missouri, this day of May, in the year of our Lord one thousand eight hundred and sixty-seven.

DAVID WAGNER,
Presiding Judge Sup. Ct. Mo.

1 [STATE OF MISSOURI, *ss:*

Be it remembered, that on the twenty-ninth day of September one thousand eight hundred and sixty-six, there was filed in the office of the clerk of the supreme court, held at St. Louis, of the State of Missouri, a transcript of the record and proceedings in a certain cause lately pending in the circuit court of St. Louis county in the State aforesaid.

Which transcript is in the words and figures following, to wit:

STATE OF MISSOURI, *County of St. Louis, ss:*

Be it remembered, that on the eighth day of January, in the year of our Lord eighteen hundred and sixty-four, there was filed in the office of the clerk of the St. Louis land court a transcript and original papers in a certain case appealed from John H. Niermeyer, esquire, one of the justices of the peace within and for St. Louis township, in the county aforesaid.

Which transcript and original papers are in the words and figures following, to wit:

Transcript and original papers from justice.

HENRY DREHMAN }
vs. }
CHARLES G. STIFEL. }

Plaintiff, on the 22d September, 1863, made complaint and filed his petition in a forcible entry and detainer case, and ordered a precept to issue, which and made returnable 28th instant. At 10 o'clock a. m. summon returned executed; and upon the day and at the hour last aforesaid parties appeared, [docket entries of Just. Mc-
2 Donald; papers sent to Just. Niemeier,] and being ready for trial, jury summoned were then duly qualified as the law directs to try the said issue; the evidence was then heard, as also the arguments of counsel, and the case given to the jury, who, after a short retiremt, returned the following verdict: We, the jury, find

the defendant guilty in manner and form as charged in the complaint; and do further find that the complainant has sustained damages by reason of the premises to the value of twenty-three hundred dollars; and also, that the value of the monthly rents and profits of the said tenements is forty dollars. On the same day defendant's counsel filed his motion for a new trial, and on the 7th October, 1863, new trial granted and set for hearing on the 16th Oct., 1863, at 10 o'clock in the forenoon of said day.

The justice costs	5 95
Constable powers	6 00
Jury fee paid by pl'ff.	3 00
Witness John Coons, 1 day	50
J. J. Fisher, 1 do	50
Jefferson Stiles, 1 do	50
John Herberk, 1 do	50
C. Lorby, 1 do	50
W. Wasenhahon, 1 do	50
F. Lohman, 1 do	50
Herman Scolberg, 1 do	50
W. Stolberg, 1 do.	50
	$19 45
Brought up	$19 45
Witnesses continued—	
H. Harman, 1 day	50
	$19 95

These costs paid by C. G. Stifel.

3 On the 16th October, 1863, parties again appeared, and defendant's counsel made a motion for a continuance to obtain testimony; motion sustained, and continuance granted; and the trial anew set for hearing on the second day of November, 1863, at 10 o'clock a. m., at the time and place last aforesaid. Parties again appeared, and on motion of defendant's counsel, a change of venue was granted, and the record and papers sent to T. H. Neirmeyer's office for trial.

Louis Brinker	1 50
John Coons	1 50
Herman Stalburg	1 50
Henry Heirman	1 50
Justice costs	7 50
Constable powers	6 75
Witnesses Henry Weischan	1 50
John H. Monman	1 50
Charles Creiser	1 50
Wm. Day	1 50
Adam Hurecker	1 50
	$27 75

STATE OF MISSOURI, *County of St. Louis :*

I, the undersigned, justice of the peace within and for the county aforesaid, certify that the foregoing is a full, true, and complete transcript of all entries made in my docket in relation to the above-entitled cause, and that annexed are all the original papers now on file in my office, in relation to the cause in which Henry Drehman
4 is plaintiff and Charles G. Stifel is defendant.

Given under my hand this 6th day of November, 1863.

PHILIP McDONALD,
Justice of the Peace.

Compl't.

Before P. McDonald, justice of the peace.

HENRY DREHMAN, compl.,
vs.
CHARLES G. STIFEL, def't.

SEPT. 22*d*, 1863.

Henry Drehman complains to P. McDonald, justice of the peace within and for the county of St. Louis and State of Missouri, that on the 15th day of June, A. D. 1861, he was lawfully possessed of the following-described lot or parcel of ground, situate in the city of St. Louis, (county of St. Louis, and State of Missouri,) in what is called Tyler's addition, and being the same lot leased by complainant of Mary L. Tyler, on the 1st day of April, A. D. 1854, for the term of 20 years, to wit: Thirty feet on the west side of North Fourteenth street, adjoining ground leased by said Mary L. Tyler to Sarah P. H. Koons, on the 1st day of May, 1853; which said thirty feet is in block No. 627, and is bounded as follows: Beginning at a point on the west side of said Fourteenth street, one hundred and thirty-five feet south of Chambers street; thence extending southwardly
5 thirty feet along said Fourteenth street, to land leased by Mrs. Koons as aforesaid; thence westwardly with the north line of the land leased Mrs. Koons, one hundred and forty feet; thence northwardly thirty feet; and thence eastwardly one hundred and forty feet, to place of beginning on said Fourteenth street, being a width of thirty feet front on Fourteenth street, in block as aforesaid, by one hundred and forty feet deep, and same width the whole depth; and being the same lot upon which complainant made large improvements and resided upon and occupied from 1857 until the forcible entry of said Stifel. And that on the day and year aforesaid, to wit, the 15th day of June, A. D. 1861, Charles G. Stifel forcibly entered into the possession of the same premises, and forcibly detains the possession thereof.

The complainant further states that he has sustained damages by reason of the forcible entry and detainer aforesaid in the sum four thousand five hundred dollars, and that the value of the monthly rents and profits of said tenements is forty dollars.

Wherefore complainant prays judgment of restitution, and
6 for his damages, and the value of the monthly rents and profits of the premises aforesaid.

HENRY DREHMANN.

Subscribed and sworn to before me this 22d day of Sept., 1863.

PHILIP McDONALD,
Justice of the Peace.

[U. S. rev. stamp.]

Summons.

To William Powers, constable of the ninth and tenth wards of the city of St. Louis, county of St. Louis, and State of Missouri, greeting:

You you are hereby commanded to summon Charles G. Stifel, of the county of St. Louis, to appear before the undersigned justice of the peace within and for said county, at his office in said county, on the 28th day of September, 1863, at the hour of from 7 to 10 o'clock in the forenoon of said day, then and there to answer and defend against the complaint of Henry Drehman, of a forcible entry and detainer made by Charles G. Stifel, upon the lands of the said Henry Drehman, as by the complaint of the said Henry Drehman, hereto annexed, will more fully appear, and have you then and there this precept, with the return of your proceedings thereon.

7 Given under my hand the 22d day of September, 1863.

PHILIP McDONALD,
Justice of the Peace.

Const's return.

Served this summons in St. Louis township, this 23d day of September, 1863, by reading the same to the within-named defendant, also by delivering to him a true copy in writing.

WM. POWERS, *Constable.*

Docket entries of Just. Niermeyer.

Nov. 6, No. 7.—November returns, 1863.

HENRY DREHMANN
vs.
CHARLES G. STIFEL.

Action of forcible entry and detainer. Change of venue from Justice Philip McDonald's office. Papers received on the 6th day of November, 1863, and case set for trial on the 12th day of November, 1863, at the hour of 10 o'clock a. m.

And now on this 12th day of November, 1863, the parties appeared; the defendant, not being ready for trial, and for good cause shown, the case is continued to the 27th day of November, 1863; and now on this 27th day of November, 1863, the parties appeared, a notice was served upon the plaintiff by order of Major General Schofield to stay further proceedings in said cause, until otherwise ordered. The order from further proceedings in said cause was withdrawn, and the case set for trial on the 12th day of December, 1863; and now on this 12th day of December, 1863, the parties appeared, the defendant not being ready for trial, and for good and sufficient cause shown, a continuance is granted to the 19th day of December, 1863; and this 19th day of December, 1863, the parties appeared and being ready for trial, a jury of twelve good and lawful men of the county was empaneled, viz: Albert Schulheir, John Casey, Henry Burges, C. H. Miller, John Stolle, Michael Adami, T. C. Sluder, C. H. Jhenson, William Walker, John F. Fitzgerald, Christ. Schumacher, William A. Albright, who being duly sworn, and having heard the evidence in said cause, who, after their retirement, came into court and informed the justice that they were unable to agree on a verdict. They were then discharged by the justice, and case continued to the 27th day of December, 1863; and on this 27th day of December, 1863, the parties appeared, and for good cause shown, the case was continued to the 31st day of December, 1863.

Judgment for possession.

Justice Ph. McDonald	5 00
" J. H. Niermeyer	34 85
Const. Wm. Powers,	45 00
Jury fee	12 00
Witnesses:	
John Koons, 9 days	4 50
Adam Hindricker, 9	4 50
John Mohrman, 9	4 50
Louis Brinka, 9	4 50
Henry Thies, 9	4 50
H. W. Wiesshan, 9	4 50
Wm. Day, 9	4 50
Chas. Kruse, 9	4 50
H. Stabback, 8	4 00
H. Heurman, 8	4 00
Aug. Frickchle, 4	2 00
Frank Harrison, 4	2 00
John White, 4	2 00
Barth, 5	2 50
Aug. Wehmeyer, 5	2 50
H. C. Sexton, 2	1 00
Jeff. Sexton, 2	1 00
Geo. Jackson, 2	1 00
Jas. H. Biddle, 2	1 00
Wilson Duly, 2	1 00
G. W. Rawlings, 2	1 00
N. Scheulterver, 5	2 50
George Day, 2	1 00
Furth, 2	1 00
R. Hunsche, 4	2 00
Jos. Stock, 9	4 50
Chas. Koch, 9	4 50
McKee, 8	4 00
Koch, 3	1 50
Steinkemeyer, 3	1 50
John Midden, 5	2 50
H. Windhorst, 4	2 00
Kindermann, 4	2 00
W. Apenbrink, 5	2 50
Aug. Huring, 2	1 00
H. Kronsbein, 2	1 00
Jas. Kronsbein, 2	1 00
J. J. Fischer, 9	4 50
Interpreter:	
Christ. Jaeger	50

And on this 31st day of December, 1863, the parties appeared, and being ready for trial, a jury of twelve good and lawful men of the county were empaneled, viz: John Hilliard, A. C. Benson, Jesse McClendon, D. W. Clark, S. M. Day, John Gavern, Edw. S. McKurn, Henry Seibright, Samuel Turner, John L. Fitzgerald, John Newell, Charles W. Beason, who, being duly sworn, after having heard the evidence, rendered the following verdict, to wit: "We, the jury, find the defendant guilty in manner and form as charged in the complaint; and do further find that the complainant has sustained damages by reason of the premises to the value of twenty-five hundred dollars; and also, that the value of the monthly rents and profits of said tenement is thirty dollars. Jesse McClendon, foreman."

It is therefore adjudged by the justice that the said complainant have restitution of the premises forcibly detained, and recover
10 from the defendant the sum of five thousand dollars; and also at the rate of sixty dollars per month for rents and profits from the 31st day of December, 1863, until restitution be made, together with the sum of one hundred and ninety-four 85-100 dollars for costs expended in this behalf, and have execution therefor.

And now, on this 5th day of December, 1864, comes the defendant and files his affidavit and bond for appeal in the sum of fourteen thousand dollars, with Christopher A. Stifel and John F. Tolle as securities, which is granted by the justice.

STATE OF MISSOURI, *County of St. Louis, ss:*

I, John H. Niermeyer, a justice of the peace for and within the county aforesaid, do hereby certify the foregoing to be a full, true, and complete transcript of the entries and proceedings in the case of Henry Drehmann vs. Charles G. Stifel, as the same are of record on my docket, and that the papers hereto attached are all the original in said cause.

Given under my hand this 6th day of January, 1864.

JOHN H. NIERMEYER,
Justice of the Peace.

Aff't for app'l.

In the court of justice, John H. Niermeyer, justice of the peace in and for the 9th ward of St. Louis city, in St. Louis co.

11 HENRY DREAHMAN, plaintiff, *vs.* CHARLES G. STIFEL, defendant. } Under the act concerning forcible entries and detainers.

The defandant, by his attorneys, Jecko & Clover, and R. S. McDonald, esq., prays and applies for an appeal from the judgment of the justice of the peace in this case.

CHAS. G. STIFEL, *by his Attorneys.*

STATE OF MISSOURI, *St. Louis County, ss:*

Charles G. Stifel, the above-named defendant, being duly sworn upon his oath, saith that he, the affiant, verily believes that he is aggrieved by the judgment of the justice, and that he does not take the appeal for vexation or delay, but that justice may be done.

CHAS. G. STIFEL.

Sworn to and subscribed before me this 4th day of January, 1864.

JOHN H. NIERMEYER,
Justice of the Peace.

[U. S. rev. stamp.]

Bond.

Recognisance.

Know all men by these presents, that we, Charles G. Stifel, as principal, and Christ. A. Stifel and John F. Tolle, as surety, acknowledge ourselves indebted to Henry Dreahman, the complainant
12 in the case above entitled, in the sum of fourteen thousand dollars, upon this condition: That, whereas the said Charles G. Stifel has appealed from the judgment of John H. Niermeier, a justice of the peace, in an action of forcible entry and detainer between the said Henry Dreahman, complainant, and himself, the said Charles G. Steifel, defendant; now, if the said Charles G. Steifel shall prosecute his appeal with effect, and without delay, neither commit nor suffer to be committed any waste or damage on the premises whereof restitution is adjudged, and pay all rents and profits, damages and costs, that may be adjudged against him, and otherwise abide the judgment of the St. Louis land court in said cause, then this recognizance to be void.

Given under our hand this fifth day of January, 1864.

CHARLES STIFEL.
CHRISTOPHER A. STIFEL.
JOHN F. TOLLE.

Attest and approved.

JOHN H. NIERMEYER,
Justice of the Peace.

And afterwards, to wit, at a special term of the circuit court of St. Louis county, at its April term, 1866, the following proceedings were had in this cause, to wit:

13 *Jury sworn.— Trial begun and cont's.*

HENRY DREHMANN
vs.
CHARLES G. STIFEL.

TUESDAY, *May 1st*, 1866.

Now, at this day, come the parties, by their attorneys, and the defendant files a motion to dismiss herein, which, being heard by the court, is overruled; and thereupon come a jury, to wit: Louis Meyer,

Valentine Reidel, Jacob Keller, August Rust, William Fichtner, L. F. Fin, S. D. Drake, Louis Krug, T. H. Voss, James Classey, Julius Sperbach, and Paul Aubuchan, twelve good and lawful men, who, being duly elected, tried, and sworn the issues herein joined well and truly to try, the trial progressed, but not being finished at the hour of adjournment, is laid over until to-morrow.

And afterwards, to wit, at the same term, the following further proceedings were had in this cause, to wit:

HENRY DREHMANN
vs.
CHARLES G. STIFEL.

THURSDAY, *May 3d*, 1866.

Now again come the parties and the jurors, as aforesaid, and thereupon the trial progressed, and being finished, the jurors aforesaid, upon their oaths aforesaid, say they find for the defendant.

14 It is therefore considered by the court that the plaintiff take nothing by his suit in this behalf, but that the defendant go thereof, without day, and recover of the plaintiff his costs and charges herein expended, and have execution therefor. Motion for new trial filed.

Mo. for new trial filed.

(For which motion for new trial, see "Bill of exceptions." Clerk.)

And afterwards, to wit, at the same term, the following further proceedings were had in this cause, to wit:

Mo. for new trial overruled.

HENRY DREHMANN
vs.
CHARLES G. STIFEL.

SATURDAY, *May 19th*, 1866.

The court having heard and fully considered the plaintiff's motion for a new trial herein, doth order that the same be overruled.

Ap'l to gen'l term granted.

On motion of the plaintiff, by his attorney, an appeal to the general term is allowed him from the judgment herein rendered.

And afterwards, to wit, on the twenty-fifth day of May, A. D. 1866, there was filed in this cause a bill of exceptions; which bill of exceptions is in the words and figures following, to wit:

15 *Bill of exc'p's.*

HENRY DRAHMAN, plaintiff,
vs.
CHARLES G. STEIFEL, defendant.

Action of forcible entry and detainer, by appeal from a justice's court.

Be it remembered, that this cause came on to be tried in the circuit court of St. Louis county, in the State of Missouri, in room No. 2 of said court, on the 1st day of May, 1866, and thereupon came a jury; and upon such trial the plaintiff read his complaint, filed herein, to the jury, and then introduced the following evidence to support the same, to wit:

Jno. Coons's test.

John Coons, who testified that he was well acquainted with plaintiff and defendant; that he formerly resided in the city of St. Louis, but now resided in Bridgton, in St. Louis county; that he is a carpenter by trade; that knows the property in controversy; that it is on North 14th street, in block 672, in Mary Tyler's addition to the city of St. Louis near defendant's brewery, and adjoining ground heretofore owned by Sarah P. H. Coons; that the lot is about 30 feet on 14th street, and runs back to an alley about 140 feet, as he thinks; that Drahman resided on this lot, and kept a family grocery in part of
16 the house, until the house was partially burnt. This fire was in May, 1861; soon after the fire, Drahman moved off the ground, but left an agent to take care of the property; his name was Driver. Plaintiff left some things in the house in the care of Driver, and when Driver was absent he kept the doors locked. The fire injured the house materially; the roof of the main building was partly burnt off. In June, before the house was torn down, Coln. Steifel sent for witness, and asked him if he was attending to Drahman's affairs in his absence, and witness answered that Drahman had asked him to do so.

(Plaintiff's counsel then asked witness what occurred, if anything, in regard to the repairing the house, the roof of the house, prior to the time of the forcible entry.

This was objected to by defendant's counsel as irrelevant and immaterial, and the court sustained the objection, to which the plaintiff's counsel excepted at the time.)

Witness stated, that on or about the 15th of June, 1861, he saw Drahman's houses torn down. I was in front of the building; it was torn down by men in blouses. I suppose they were soldiers. I did not hear any order given. I saw Coln. Steifel standing be-
17 tween his brewery and the house of Drahman at the time, but neither said or done anything that I know of. The Coln. never said anything about tearing down the houses, but at one time before that spoke to me about buying the premises. Witness said he knew

the size and quality of the houses, as he helped to build them. The first or main building was 32 by 18 feet, with a hall 6 feet wide, 2 stories high, and hall above; there was a building back of this, 25 feet by 24; both of these were frame; there was also a brick, 25 feet by 8; there were 10 rooms, besides 3 store-rooms; there was a cellar, 32 feet by 18, and 7 deep, walled with stone; there was a brick smoke-house, 12 feet by 8, and 20 feet high, iron roof, and fire-proof; also, a stable, 24 by 18 feet, 1½ stories; and two sheds—one 25 by 16, and one 20 by 16 feet; also, cisterns, 18 feet deep, about 6 feet square. The lot was fenced in about 170 feet, posts and plank on end. After the fire I examined the houses minutely, because I was making a trade with Drahman to repair them, and think I can estimate their value, in the condition they were then in, pretty correctly. The value of the main building was from 2,200 to 2,300 dollars, including the cellars; the smoke-house, $175 to $200; the side
18 brick house, $280; the stable and sheds, $300; cisterns, $60; fencing, $50. The materials of which the houses were composed were carried off, and cellar and cistern filled up. After the houses were torn down, and fence, there was a fence put around the brewery lot that also enclosed this lot in the same enclosure. This fence is still around the brewery of Coln. Stifel and the lot in dispute, and was built by Col. Steifel and I have often seen the tubs and barrels of Col. Steifel standing on the lot in controversy. I saw some tubs and barrels, used for the brewery purposes, on it yesterday, as I was passing. I think the rent of the whole premises, after the fire, was of the value of $40 per month.

Cross-examined:

In 1861 I followed the trade of carpenter, generally, but had no shop; kept my tools at my house; I kept a team part of the time and hauled wood for others; I lived part of that year in a building in Dobyn's row, or block; I think the house was pulled down between the 18th and 20th June, 1861, and burnt early in May, not far from the 1st; the building was insured by Drahman; Drahman was keeping a family grocery in the house at the time of the fire; witness
19 lived 3 or 4 squares from Drahman's at the time; I think the lot was 140 by 30 feet; the brick house had three sides of brick and one of studding; was about 16 or 17 feet long; had not been built two years; the frame had two sides; I put up the main building; it cost about $1,000; it was built in 1852; the next addition, two years after this, I did not build; the brick was built about two years before the fire; it was worth $300, and the 3d addition was worth more; I have no interest in the result of this suit; the fire burnt about half the roof of the main or 1st building, and run down and burnt several scantling, and burnt a hole through the upper floor the width of a plank, and about 18 inches long; also burnt some of the weather boarding, and some of the house above was blackened, but not charred. Drahman lived in three rooms, back of the store-house, and kept a grocery in that; Day & Harrison lived in some of the rooms; the upper rooms in the brick were used as lodging rooms,

generally, for waggoners; the lower rooms of the brick was used as store-rooms; the plastering in some of the rooms was much injured by the water used in putting out the fire; the brick, and three
20 rooms in the frame addition, were not so injured but they might have been occupied. Drahman, and all the families in the house, removed immediately after the fire; Drivers had possession of the property, but I do not know that he slept there, or near; always there in the day; I was seldom there, and not after night; I saw a bedstead and some other furniture of Drahman in the house after he left. I think the whole improvements after the fire were worth $3,500. There were soldiers of the home guards about Coln. Steifel's brewery about the time [the time] the houses were torn down—before and after; I have seen as many as 25 at a time, in blouses & with side-arms; the houses were torn down about 11 o'clock a. m.; saw some home guards, with a rope attached, pulling down the walls; a frame house near Drahman's was burnt at the same time; it was said to be Coln. Steifel's; the ruins of this house were pulled down before Drahman's, I think.

(The foregoing evidence in regard to pulling down Col. Steifel's house was objected to by pl'ff as irrelevant, and not growing out of examination in cheif. The objection was overruled by the
21 court, and the evidence admitted. To which ruling the plaintiff excepted at the time.)

Lewis Brinker's test.

Lewis Brinker testified that he knew both parties; that he lived on 14 between Chambers and Howard streets; in June, 1861, I belonged to Coln. Steifel's regiment; I was present and assisted in pulling down the houses of plaintiff; it was about the middle of June, 1861; the house was near defendant's brewery; I was first ordered to aid in pulling the houses down by the captain of my company, but before we commenced, I heard Coln. Steifel say that the houses must be pulled down within a few hours. I belonged to co. C; we were told every man might have what he could carry away. The window shutters were taken down and I got 3 pair and carried them away. I asked Coln. Stifel for them and he gave them to me.

Cross-examined:

I think it was in June; was in co. C; Thorwald was my captain. The headq'rs of the reg't was at Coln. Steifel's brewery; it was near by the house in controversy. Steifel had a frame house near Drahman's. There was a fire about the 1st of May, 1861, and
22 both houses were badly burnt. The fire was from a month to six weeks before D.'s house was pulled down. My captain was the first person I heard speak of tearing away D.'s houses. He said he had received orders from Coln. S. for the men of our company to assist in pulling them down, and that every man who helped might have what he could carry off. Do not know the condition of the house. The shutters were good. The house was partly burnt and

the roof so injured that no one could live in it then. Do not recollect whether S.'s house was pulled down then or before that. I had no interest in that, only had an interest in the shutters; they came off D.'s house; one pair I unhinged from one of the lower windows of Drehman's house, and one pair was thrown down to me from the 2nd story of Drehman's house. The soldiers tore down the building under the immediate orders of the captain.

William Wisehan: I know the parties; I am by trade a carpenter. In June, 1861, I was present and helped tear down D.'s house. I was a soldier in Coln. S.'s reg't. We were ordered to pull down the house, and told we might take home the lumber for our own use. The
23 house was locked at the time and we broke it open. Charles Driver was D.'s agent and had the keys of the house, but was not present. I did not hear Col. S. give the order; it was proclaimed that he had given the order; he was present and looking on. I helped to build D.'s house, and after the fire I was one of the appraisers and appraised the house at $1,520; the smoke-house was brick and worth $125; the stable was worth $125; one shed $30, and one $20; the fence $50; the cisterns $25; the cellar was included in the $1,520. I think the property would have rented for $40 per month. The cisterns and cellar were filled up. Colonel Steifel put a plank fence around the lot of D., inclosing it in the same enclosure with the brewery of S. It was used by S. for his barrels and tubs; afterwards there was a stable on the lot and I suppose S. built it, as it has been put on since S. fenced it in. The brick shed was not included in the $1,520 valuation.

Cross-examined:

When I appraised the property Coln. S. was not present. It was a few days after the fire. I said I thought the stable S. built was on D.'s lot. I think so still; I do not know. The
24 smoke-house is still on D.'s lot. I have not been inside the inclosure since S. built the stable, but it seems from the outside to be on D's lot. I have no interest in this suit. John Coons & nne built D.'s houses in part; the cellar was filled; the foundation was valued in the $1,520, and is worth $200; do not suppose the cistern walls were taken out; the ground was worth 35 or $40 a front-foot. I suppose D. got me to appraise the house because I helped build it. I heard S. tell D. he wanted the ground for government use. D.'s building had window shutters. I went up the Mo. river about the 28 June, with part of the reg't and D.'s stable was pulled down while I was gone; the present one was built since. I saw D. offer to pay ground rent to S. D. had gold in his hand & S. would not take it. D.'s lot was not used for drilling; it was sometimes used at roll-call. We drilled in the brewery. During the time we had our head-quarters at the brewery, this ground was mainly covered with beer-tubs and barrels. I work at the carpenter's trade for myself. Don't know who put up the fence after the house was torn down.
25 I swear that the fence was put there by defendant's order, because nobody was allowed to come upon the premises without an order from def't; have no other reason for saying Stifel ordered

the premises to be fenced; the premises were used for roll-call but not for drilling.

Re-examined:

When D. tendered the gold, S. said he did not want it; that he wanted the property. It would have taken $542 to have repaired the house of D. The insurance co. estimated the loss by fire to Drehman's house at $542, and his goods at $858; and D. was paid $1,400 insurance—$542 on house, and $858 on goods and furniture. This money was paid Derhman by the insurance co. for loss on his house and goods by the fire in May, before it was torn down.

Henry Winters' test.

Henry Winters testified that he knew the parties; was present when the house was pulled down by order of Capt. Thorwald; knows the property pulled down was not S.'s.

Cross-examined:

About eight days after started with part of the regiment up the Mo. river.

Henry Bachtel's testimony.

Henry Bachtel testified: Knows of the taking down of plaintiff's house in June, 1861; Col. Stifle directed it. He was not
26 present, and I was not present when houses were taken down. Col. Stifle employed me to work on the premises. I arranged the fixtures in office shelves, &c., and worked at the fence; Col. Stifle employed me; this was in June; saw the smoke-house broken open by some of the company. Stifle was not present, but gave the order. Col. Stifle suffered volunteers to come forward from each company to make the fence, and they should have 40 cents extra pay; don't know whether Stifle or government was to pay for the extra work. The quartermaster furnished the lumber. It was furnished on the quartermaster's order. A small brick house was built in addition to the headquarters; part of the regiment drilled on the ground of plaintiff.

Plaintiff then offered in evidence the original lease of the ground in controversy, from Mary Tyler to plaintiff, to which the defendant objected as irrelevant and inadmissible, and not bearing on the issue, the question of title not being in issue; and the court sustained the objection, to which the plaintiff excepted at the time.

27 *Lease of Mary Tyler to pl'ff.*

This deed of lease, made this first day of April, eighteen hundred and fifty-four, between Mary L. Tyler, of Jefferson county, city of Louisville, in the State of Kentucky, party of the first part, and Henry Drehman, of the city and county of St. Louis, of the State of Missouri, party of the second part, witnesseth: That the said party of the first part, for and in consideration of the rents to

be paid, and the covenants and agreements, hereinafter mentioned and contained, to be faithfully kept and performed by the said party of the second part, has this day leased, and to farm let unto the said part of the second part, for the term of twenty years from the day of the date hereof, the following-described piece or parcel of grounds: Thirty feet on the west side of North Fourteenth street, adjoining ground leased by said first party to Sarah P. H. Koons, on the first day of May, 1853, which thirty feet, hereby leased, is in block No. 627, and is bounded as follows: Beginning one hundred and thirty-five feet south of what will be Chambers street when extended and opened on the west side of said North Fourteenth street, other extending southward by thirty feet to the ground
28 leased Mrs. Koons; thence westwardly with the north line of the boundary of the ground leased Mrs. Koons one hundred and forty feet; thence northwardly thirty feet, and thence westwardly one hundred and forty feet to said North Fourteenth street at the place of beginning, being a width of thirty feet front in block af's'd, on s'd Fourteenth street, by one hundred and forty feet deep, and same width the whole depth.

To have and to hold the said described parcel of ground unto the said party of the second part, and his legal representatives, for and during the term aforesaid, he yielding and paying to the said party of the first part, or her legal representatives, as rent therefor, the annual sum of thirty dollars for the first ten years of this lease, and for the second ten years' rent of this lease the property hereby leased is to be valued, exclusive of improvements as of the first day of April, 1864, by two disinterested freeholders, in no way related to, or connected with, either party, or interested in fixing the value of the property; one to be selected by each party to this lease, and the valuers so selected shall fix the value of the ground hereby leased as of the first day of April, 1864; but if said two persons so
29 selected cannot agree, they shall agree upon a third person, not by lot, however, but by each naming a person possessing same qualifications as themselves, until both can agree upon some one, and the award of the third person so selected shall be binding on the parties hereto as to the value of the ground; and the said party of the second part shall pay to the said party of the first part annually, for the last ten years of this lease, which begins on the first day of April, 1864, a rent equal to six per cent. per year on the value of the ground ascertained, as herein required; and should either party fail or refuse to select valuers as herein allowed for ten days after the first April, 1864, the other party may select both valuers, and they shall proceed to value the ground, as though both parties to this lease had selected, and the value fixed by them shall be binding on both parties, as though both had selected, as allowed hereby.

The said party of the second part, for himself and legal representatives, hereby covenants with said party of the first part, her heirs and legal representatives, to pay all the rents aforesaid,
30 for each and every year during this lease, quarterly, on the

first days of January, April, July, and October; the first payments and assessments to be made on the first day July, eighteen hundred and fifty-four; and also to pay all city, county, and State taxes and assessments of every description, nature, or kind whatever, which may from time to time be required or demanded of said premises, whether general or special tax, on or before the first day of September of each and every year during this lease; the said party of the second part, for himself and legal representatives, hereby covenants and agrees to take the said lot of ground for the time and at the rates above specificed, and that he will not create or suffer others to create any nuisance or nuisances upon the premises, or on the streets or alleys adjoining said property; and if any should at any time be thereon, he is to have the same removed at his own proper costs and charges as often as the same may occur; and furthermore, that he will, and his legal representatives shall, pay all expenses and charges levied on said lot for grading and paving the streets, alleys, and sidewalks adjoining the same, in any way,
31 at such time and in such manner as may be required or ordered by the mayor or city council of said city of St. Louis, or as may be required by said party of the first part or her legal representatives, and in every other way comply with all the orders, ordinances, and city regulations, and requisitions of the mayor and city council of the city of St. Louis, and those acting under their authority, in relation to said demised premises; all at his own proper costs and charges. The said party of the second part is to have the privilege, at the expiration or termination of this lease as herein provided, of removing all buildings and improvements erected on said demised premises, provided the rents and taxes, as herein provided, are all fully paid off and discharged in the manner herein required, and this lease in every respect complied with by said party of the second part, or his legal representatives, but not otherwise; the said party of the second part, or his legal representatives, shall not sublet, abandon, assign, or transfer this lease, or any part thereof, to any one or more persons for the whole or any part of the term of this lease, without the written consent of said party of the first part
32 being had and obtained from her by said party of the second part or his legal representatives; and if he shall do so, it shall create an absolute forfeiture of this lease. It is further covenanted and agreed between the parties to these presents, and is a condition precedent on which this lease is executed by the said party of the first part, that if the said party of the second part, or his legal representatives, shall fail to pay off and discharge all the rents and all taxes as they shall fall due, as herein provided, whether demanded or not, and to comply with all the other covenants herein contained, on the part of said second party for twenty days after the same fall due and are made payable, that then, and in that event, and as often as such failure shall happen, this lease, at said first party's election at any time thereafter, be forfeited, together with all the improvements on said leased premises; and said party of the first part, or her legal representatives, shall have full power and lawful

authority to re-enter upon and take possession of said demised premises, together with the improvements thereon, and terminate this lease. The receipt and acceptance of money after any forfeiture
33 of this lease, shall not operate as a waiver of any forfeiture which may thereafter occur during this lease; all forfeitures of this lease are to be solely at the option of said party of the first part, and any failure on the part of the said party of the second part to comply with any one or all of the covenants herein entered into by him shall make and create an absolute forfeiture of this lease, together with all the improvements erected on said leased premises; and all the estate hereby conveyed shall be absolutely void from the day the forfeiture occurs; and the said party of the second part binds himself (if required by said party of the first part, or her legal representatives) to surrender the quiet and peaceable possession of said premises, and the improvements erected thereon, to said party of the first part, or her legal representatives, immediately upon this lease being declared forfeited by said first party, her heirs, agent, or assigns; the said party of the second part covenanting and agreeing with said party of the first part that he, the said party of the first part, shall have full authority, power, and right, whenever a forfeiture of this lease occurs, to re-enter upon, take, have.
34 hold, and enjoy the possession of said leased premises, and all the improvements which may be erected thereon, without compensation of any kind at any time for the same to said party of the second part, or any one else, and this lease to be forever void and at an end, any and all laws, usages, or customs to the contrary notwithstanding. The said party of the first part hereby agrees to keep the said second party in the lawful possession of said leased premises during this lease, provided said party of the second part complies with all the covenants, agreements, and stipulations herein contained on his part. At the expiration of this lease, either by forfeiture or by its term of time being completed, the said premises are to be delivered to said party of the first part, her heirs or legal representatives or assigns, without hinderance or delay from any cause or pretence whatever. The said lessee is, under penalty of forfeiture, bound to keep said premises free of any disorderly, bawdy, or gambling establishments, or nuisances; a lien is hereby retained on any and all improvements erected on the leased premises by said lessee or his legal representatives, or by any one who
35 may claim under him, and are bound for the payment of each quarter's rent, and for the city, county, and State taxes and assessments, as well as for any arrears of rent, or taxes and assessments, and to this end and for this purpose, this lease and all improvements that are now on, or which may hereafter be put on, said demised premises, are declared in mortgage to said party of the first part, her heirs or assigns. And in case the improvements shall be removed, as herein provided, the demised premises shall be left in good tenantable order, free of rubbish and filth. Should said party of the second part, his heirs or assigns, wilfully, negligently, or in any way with or without his consent, allow the possession of this

property, hereby leased to him, to pass into other hands in any other way than as herein prescribed, he shall be liable to said party of the first part for all losses, costs, and damages of every kind occasioned thereby to said party of the first part.

Witness our hands and seals the day and year first written.

MARY L. TYLER, [SEAL.]
By ISAAC H. STURGEON, *Atto. in fact.*
HENRY DREHMAN. [SEAL.]

36 My power of attorney having been revoked to Isaac H. Sturgeon, at his own instance I acknowledge this lease made by him as though signed by me in person.

Witness my hand and seal this 19th day of February, 1859.

MARY L. TYLER. [SEAL.]

STATE OF KENTUCKY, *County of Jefferson, ss:*

Be it remembered, that on this 19th day of February, 1859, before me, the undersigned, a commissioner of deeds for the State of Missouri, came Mary L. Tyler, who is personally known to me to be the same person whose name is subscribed to the foregoing instrument of writing as a party thereto, and she acknowledged the same to be her act and deed for the purposes therein mentioned.

In witness whereof, I have hereunto set my hand and seal of office the day and year last above written.

C. C. GREEN, [SEAL.]
[SEAL.] *Commissioner of Deeds for the State of Missouri.*

STATE OF MISSOURI, *County of St. Louis, ss:*

I, the undersigned recorder for said county, certify that
37 the foregoing instrument of writing was filed for record in my office March 11, 1859, and is truly recorded in book No. 216, page 289.

Witness my hand and official seal the date aforesaid.

[SEAL.] C. KEEMBE, *Recorder.*

The plaintiff then offered to read the deposition of John Kleinegger, to which defendant by his counsel objected as immaterial and irrelevant, and the court sustained the objection to all that part included in red marks, to which plaintiff excepted at the time.

Dep's'n of John Kleinegger.

John Kleinegger, of lawful age, being by me sworn and examined on the part of the plaintiff, deposeth and says:

I reside in Shulenburg's addition to the city of Stillwater, Washington county, Minneesota; I am sixty-five years of age; I resided in the city of St. Louis, Missouria. from the year 1842 to the year 1861; I am acquainted with both the plaintiff and defendant in the above action; I knew the defendant four years and the plaintiff seven

or more years before I left St. Louis; they were both living in St. Louis at the time I knew them; Drehman lived on 14th street, on the leased ground, the building belonging to Dreahman; he
38 bought it of one Koon, and was living there between the years 1850 and 1861; the house that Drehman lived in partly burnt down in the latter part of 1859, or the fore part of 1860; he did not live on the ground after the burning of the house; after the house was burnt down and the rub(b)ish removed, it was fenced in and occupied by the defendant, Col. Stifel's, regiment as drill-ground; the soldiers of Col. Stifel's regiment tore the remains of the building down, some two weeks or more after the burning, and removed everything off the ground; Col. Stifel lived and had his headquarters near the ground where the [the] house was burnt; Col. Stifel told me in January, 1859, that he owned the ground on which the house stood; he told me this before the house was burnt.

Ex.

On the second or third day of January, 1859, Drehman (the plaintiff) requested myself and Mr. Koon to pay the rent due on the lease for the ground above mentioned, and handed in the amount in gold to pay Stifel the rent; we took the money and went to Mr. Stiflee's office, and told him we were sent by Mr. Dreham to pay the rent due on the lease; Mr. Koon took
39 the gold out of his purse, and counted it down on the table; Mr. Stifel refused to take the money, saying he wanted to see the plaintiff Dreham, that he wanted to give him another peice of ground in exchange. There was no objection made by Mr. Stifle to the amount, or the kind of money tendered; Mr. Stifle refusing to take the money, we went away; this was before the house was burnt, and while Dreham was residing in it; at the request of Mr. Dreham, we went three different times, during the months of February and March, with money to pay the rent, but he always put us off and declined to take the money; Koon and I went to defendant's house the last time on the first day of April, 1859, at the request of Dreham, and counted down on the table the full amount of rent due up to date, in gold and silver, and showed the book containing the amount of rent due; Stifle examined the book and the money, and made no objection to the money or the amount; but said he did not want the money, but wanted the ground, and if Dreham does not consent to that, I will fix him. Stifle then told us to go back to Dreaham's, and that he (Stifle) would be there
40 at one o'clock of that day and try to arrange the matter with Dreaham; Koon and myself went to Dreaham's about ten o'clock that a. m.; I remained there untill forty-five minutes past two o'clock of that day and Stifle did not appear; this was before the house was burnt down.

Ex.

Ex.

I remember all I have stated from recollection, as distinctly as tho' the transaction had occurred yesterday.

Cross-examination:

I carried on a bakery in St. Louis for about seven years; in the old country I was a saddler by occupation; the plaintiff in this action keept a family grocery store; I was in the bakery business in St. Louis during the time mentioned in my examination in chief; I was not in the employment of the plaintiff, but had business with him, selling him bread; I lived five squares from plaintiff, on Broadway, between Benton and Front streets; plaintiff is not related to me in any way; Mr. Stifle and I have always been on the best terms; when I first went to Mr. Stifle, at Mr. Dreham's request to tender the rent money, Dreham said defendant had not dealt right
41 with him; that he and defendant had agreed to buy the land together; that he was offended with him; that defendant had gone unbeknow to plaintiff and bought it himself; that being displeased with defendant, he did not wish to see him himself; Dreham said, here is the money, take it and tender to Stifle the amount due on the lease.

(At this point in the examination a paper hereto attached, marked "A," was shown to witness and asked what it was.)

Ex.

The answer. It is a memorandu*n*(m) I made in 1859 of what occured between Mr. Stifel and myself; the memorandums were made on the same days the conversations with Mr. Stifel were had. I left the memorandum with Mr. Dreham at the time I left St. Louis; it is all in my own handwrite; I received it again in January, 1866; when I first received it I did not know what it was untill after reading it; I have a distinct recollection of all the circumstances as stated in my testimony. At the time the conversation took place, Stifle carried on an extensive brewery in St. Louis next to the ground occupied by plaintiff. The conversation took place in Mr. Stifle's office. I have forgot
42 the amount of money tendered, but it was the full amount due on the lease, as shown by Dreham's books. The book contained the receipts of the rents heretofore paid for this land to the former owners. The money tendered was all in United States coin, it was counted out and laid on the table, and Mr. Stifle looked over the money and said, Kleinegger, you are my friend. I don't want the money, I want the land; and if Dreham will consent to that, I will make it all right with him, and we will be good friends as heretofore; that he would go to Dreham at one o'clock and make it all right with him; but he did not come.

Ex.

I have stated all I know about the case.

JOHN KLEINEGGER.

Sworn to and subscribed before me the 8th day of February, A. D. 1866.

A. VAN VORHES,
Justice of the Peace.

D. 1859, d. 1. April bin ich Unterschriebener und Mr. John Koons nach Mr. Stiefel gewesen, um die Pacht und das früher schon angebotene Geld für H. Drehmann zu bezahlen. Wir sahen Herrn Stiefel des Morgens bei 7 Uhr, am obigen Datum.

43 Er beschied uns, um 1 Uhr Mittags desselben Tages, wolle er, Mr. Stiefel, in H. Drehmann's Wohnung kommen und alles mit H. Drehmann abrechnen. Ich bemerkte Herrn Stiefel in meiner Muttersprache, er sehe das ganze Geld vor sich liegen, warum er es nicht haben wollte. Antwortet er, Stiefel, er ging 1 Uhr an Drehmann's Wohnung und rechne alles in Ordnung ab. Ich war denselben Tag in des H. Drehmann's Wohnung. Es kam kein Mr. Stiefel 45 Minuten nach 2 Uhr, am 1. April 1859.

John Kleinegger.

Mr. John Kleinegger, von Herrn Bierbrauer Stiefel, wohnhaft beide in St. Louis, Micherry als Bevollmächtigter von Herrn Stiefel und Henry Drehmann gesprochen und angehört hat mit der Unterredung des anderen Bevollmächtigten, Mr.

A. Das erste Besprechen geschah in Englisch so gut von mir selbst als von meinem Freund, Mr. Da ich der englischen Sprache nicht vollständig mächtig bin, da in dieser Beziehung das Handelens vorstehn, so richtetete ich in meiner Muttersprache und sonstige in dieser Sachen Fragen an Herrn Stiefel.

B. Sind Sie der Meinungsansicht, daß die Rechnung nicht richtig sei. Antwort er Stiefel glaube bei Doll. 7 möge er wolle er zugeben richtig sein, sonst habe er, Mr. Stiefel, Niemanden Auftrag gegeben, auf seiner Rechnung etwas von Drehmann zu holen. Die Steuer-Quittung nahm er nicht an.

C. Dann sagte ich, wir haben das baare Geld in Gold, wir sind beauftragt zu bezahlen.

D. Vor uns liegend auf einer Tafel gezeichneter Plan, den Herr Stiefel aufzeichnete. Bemerkte Mr. Stiefel er selbst wolle 50 Fuß von dem Grundstück haben, wo ich sagte, wir haben nicht den Auftrag, das thun zu können.

44 E. Dann machte Mr. Stiefel folgende Bemerkung. Unter keiner Bedingung nehme er die Lease, (Pacht gemeint.)

Er wolle den Grund und Boden zu tauschen.

Er, Mr. Stiefel, wisse wohl, daß H. Drehmann ihm nicht gut sei, und ihn um ein paar Thaler verklagen würde, dann wolle Herr Stiefel, drohend mit der rechten Hand und Zeigefinger, demselben andere Seiten aufspannen. Er, Mr. Stiefel, sagte, es sei sein Plan gewesen, wie er sich ausdrückte, das Land selbst zu benutzen, würde sich Mr. H. Drehmann dazu verstehen zum Tausch, so werden Sie wieder wie zuvor gute Freunde sein, und dieses wäre auch ein Vortheil für Drehmann.

Die Pacht (Lease) wollten sie schon einigen im billigen Wege.

John Kleinegger.

1859.

N. B. Zuvor 3 Mal nach des Herrn Stiefel's Wohnung gewesen, also 4 Mal.

J. K.

Here plaintiff closed his case.

And defendant introduced the following evidence, to wit:

Thos. J. Saxton's test.

Thomas J. Saxton: He testified that he was a carpenter and had been for 20 years past in the city of St. Louis. Knows the property in controversy, and knows the value of property in that part of the city. I was present at the fire and helped to put it out, aiding at one of the engines. D.'s house and a frame of S.'s were

45 both on fire at the same time. I would not have removed the ruins of D.'s house for them; they were valueless; the house never was well built; the frame was a frame. The store-room down stairs was not much injured; as they were they could not have been rented without repair. I profess to be a judge of such things; the

home guards had their h'dq'rs at Coln. S.'s brewery; saw them frequently parading there in the lot; cannot say positively on D.'s lot; that and the brewery were enclosed together, and I did not notice so particularly; I know John Coons; have heard persons speak disparagely of him frequently; from what I have generally heard people say of him, I would not believe him on oath.

Cross-examined:

It would have been worth a $1,000 to have properly repaired D.'s house; it might have been patched up to do, as prices then were, for $500, but not built anew properly; before the fire, the rent of the whole property was worth $40 to $50 per month; cannot recollect any person especially who spoke disrespectfully of Coons but Wilson Dooly.

(Plaintiff then asked witness what Dooly said of Coons, to
46 which defendant's counsel objected, and the court sustained the objection, to which the plaintiff then excepted.)

Re-examined:

In 1861 rents were low; the ground rent would have been 2 50-100$ per foot.

Wilson Dooly's test.

Wilson Dooly testified that he knew the property in controversy some years ago; was at the fire in May, 1861; the frame building was much damaged, especially the upper story; that part was so badly burnt that no part of it could have been occupied without repairs; there was a brick house on the north side; I do not know that it was injured; I was in the room occupied by Harrison immediately after the fire; it was badly burnt and was unfit for use; I made no special estimate of the value of the ruins, but I would not have given $100 for it, as it [it] stood, for my use; some others who wanted it, or had use for such, might have given more; do not know the monthly value; do not know Coons's general character; I have heard it spoken of disparageingly in relation to this case frequently, but not otherwise.

Stock's test.

47 Stock testified he was a carpenter; know D.'s house; saw the fire; was at it first; the roof and upper story were badly burnt, so much so the house could not have been used without reparing; the ground naked was worth $35 per foot; rents were low when the house was burnt; it was not worth more than $18 or 20$ per month; after it was burnt, would not have rented for anything until repaired; the brewery was used to drill in, and the lots for parade and roll-call; the brewery was headq'rs; saw guns there, &c.; have been a carpenter 20 years; rents did not rise until just before the close of the war; there were two fires of D.'s house—one about six weeks before the one I spoke of, and S.'s men put it out; know John Coons; cannot say I know his general character; the fire was

first discovered by me; when I got there, D. was in the house; he (D.) came out, and Mr. Day and I said this house was set on fire, and Drehman said at once to come in and take some beer.

Cross-examined:

It would cost $700 or $800 to have repaired the injury the fire done to D.'s house; the house might have rented from $20 to $25 per month when the fire accoured; now they would rent for $35 or
48 $40; rents were then low.

B. H. Steinkeneer' test.

B. H. Steinkeneer testified that he was a dealer in groceries; that he lived near the property in dispute; saw the house before and after the fire often; it was badly burnt; it could have been repaired, but was not inhabitable after the fire; bought D.'s groceries after the fire; they were worth about $200; none of the groceries were burnt.

Cross-examined:

Do not know if household goods and furniture was injured or anything else; I only spoke of the goods in the store and which I bought; they were not injured by the fire.

Fred. Bart's test.

Fred. Bart testified that he was in S.'s reg't; saw the house pulled down by the soldiers, but does not know who gave the orders; the lot, after it was fenced in with brewery, was used for parade and roll-call, and sometimes for drilling, until we went up the Mo.; when we got back we found some soldiers stationed at the brewery; the fence around the ground was put up by the soldiers.

C. W. Bissell's test.

C. W. Bissell testified that he was ass't adg't gen'l to Gen'l Lyon first; that he was then assigned to duty with Gen'l
49 Sweeney; the defendant was colonel of the 5th reg't res. corps, Mo. vols.; he was appointed adg't soon after the street fight; I was ordered by Gen'l Nathaniel Lyon to examine this h'd-q'rs with others with a view of putting them in a state of military defence against attacks which was supposed might be made and report their condition; I made a report in writing, and Gen'l Lyon approved it. I then received a positive verbal order from Gen'l Lyon, but he told me not to have it then executed, but to request Gen'l Sweeney to go with me and examine the premises at both h'd-q'rs. Gen'l Sweeney and myself went to the brewery of defendant, and after a thorough examination, Gen'l Sweeney gave a positive order to the defendant, Col. Stiefel, to have all these old ruins pulled down and removed, the grounds smoothed, & [and] put all the grounds at and adjoining the brewery under the same fence for parade ground, and other military uses. This was after the 8th of May, 1861, and probably as late as June, 1861. Gen'l Lyon was then an officer in

the United States army, and was in command of the department of Missouri. Gen'l Sweeney was also an officer in the United
50 States army, and was in command of all the forces in St. Louis. I do not know that either Gen'l Lyon or Gen'l Sweeney had been promoted to the rank of general, but their commands were as I have stated.

Cross-examined:

I do not know the day Gen'l Harney was relieved of the command of this department and Gen'l Lyon was assigned to it; I think it was about the 4th of May, 1861. I never saw Gen'l Lyon's commission or Gen'l Sweeney's as generals, but I saw Gen'l Sweeney mustered in, and saw his muster-roll as a general, and I was recognized and paid as a colonel on his staff as early as July, 1861, and he was recognized and paid as a general at the same time by a United States paymaster. I know the government leased the south wing of the brewery of defendant, and the government had an addition built to it in 1861 for military purposes. The removal of Drahman's houses was suggested first by Col. Steifle, and it was at his suggestion it was acted upon. I consulted fully with him, as I did with other regimental commanders, as to what was necessary to be done with refer-
51 ence to putting all the posts in a state of military defence.

Mr. Hyllier's test.

Mr. Hyllier testified that defendant has not occupied D.'s lot since 1st of January, 1862; the same fence is still around the lot the government put there in 1861.

Defendant here closed.

Wit. for pl'ff test.

The plaintiff then offered to prove by a witness that the plaintiff offered and wished to repair the premises after the fire, and that S. refused and would not permit him; this was before the pulling down of the houses.

Bill of exc'p's.

Defendant objected and the court sustained the objection, to which the plaintiff then excepted.

This was all the evidence introduced by either party in this cause.

The plaintiff then asked the court to give the following instructions, No. (1 to 8 inclusive:)

Pl'ff's inst's.

DREHMAN
vs.
STIFEL.

Plaintiff moves the court to instruct the jury as follows:

1st. The jury have nothing to do with the title of either party to the ownership of the land. It is a question of possession only in the plaintiff, and of forcible entry and detainer by the

52 defendant. Therefore if the jury find that the plaintiff in peaceable possession of the premises in dispute, and that the defendant acting by his agents or servants entered upon the same against the will of the plaintiff, and took possession thereof and detained the possession, the verdict must be for the plaintiff. Given. R.

The above instruction is given by the court with this addition, "unless the defendant has established his defence according to the instructions given at his request." R.

2d. In order to constitute such a possession in the plaintiff as will sustain this action, it is not necessary that the plaintiff should stand on the land, or keep a servant or agent there, but any act done by himself on the premises indicating his intention to hold the possession thereof to himself, will be sufficient to give him the actual possession and the right to maintain this action. Given. R.

23 Mo., 407.
34 Mo., 35.
27 Mo., 251.

3d. If the jury find for the plaintiff they will assess damages for all waste and injury committed upon the premises, as well as
53 for all rents and profits of said premises up to the present time, and they will also find what is the value of the monthly rents and profits of said premises. Given. R.

R. S. 790, sect. 17.
27 Mo., 251.

4th. If the defendant was a military officer of the State or United States, he might lawfully take possession of the property of plaintiff to prevent it from falling into the hands of the public enemy. But in order to justify the seizure for that purpose, the danger must be immediate and impending, and not remote or contingent. He might also have taken them for public use, and impressed them into the public service, but in order to justify such taking, there must have been an immediate and pressing danger, or urgent necessity existing at the time, but not otherwise. And unless the defendant has shown the necessity or emergency existing at the time of the alleged order and destruction of plaintiff's property, it is no defence or justification, and the jury must find for the plaintiff. Refused. R.

19 Curtis, 427.
Harney vs. Mitchell.

(5.) The 2d sect. of the ordinance plead in bar of this action is a law retrospective in its operation, an in violation of
54 the constitution of the State of Missouri, existing at the time of the passage of said ordinance, and of no validity. Refused. R.

3 Dallas, 386.
2 Gollison, 139; 7 John, 477.
Sedg. on Stat. & Con(m). Law, 188.

(6.) Although the jury may believe from the evidence that defendant took possession of the premises of the plaintiff, and destroyed the improvements thereon, in pursuance of an order from one Lyon, or Sweeney, or the witness Bissell, under whom the defendant was acting in a subordinate capacity, yet unless he shall have shown an authority from the government of the State or United States, vested in said Lyon, or Sweeney, or Bissell, or defendant, at the time the act was done, to do the act, then the ordinance is no protection to the defendant, and the jury must find for plaintiff. Refused. R.

(7.) The jury are instructed that the testimony of the witness Bissell, in relation to the orders of Lyon, or Sweeney, to defendant, are excluded from their consideration, and are not evidence in the cause. Refused. R.

8. The 2d section of the ordinance plead in bar of this action is a bill of attainder within the meaning of the
55 Constitution of the United States, and of no validity. 36 Law Lib., 518, note F. Refused. R.

The court gave No. (1, 2, & 3,) but refused to give No. (4, 5, 6, 7. & 8.)

The defendant then asked the court to give the jury the following instructions:

Def'ts' inst's.

No. 1. If the jury believe and find from the evidence in the cause, that the act of forcible entry and detainer complained of in this action against the defendant, was an act by him done, performed, and executed after the first day of January, 1861, by virtue of military authority vested in him by the government of the United States, to do such act, or was by him so done, performed, and executed in pursuance of an order received by him from a person vested with such authority, then the plaintiff is not entitled to recover in this suit, and your verdict should be for the defendant. Given. R.

No. 2. The jury are instructed that if General Sweeney, with the approval of Gen'l Lyon, issued a military order for the tearing away and removing the premises in question, directed to the defendant, (if the defendant was at said time in the military service of the United States Government, and subject
56 thereby to the authority of the said generals,) then the matters of how said order was procured, or at whose instance, or upon what circumstances, cannot be considered by them; for the order, when issued by competent authority, is a justification of the doing of the act by a military subordinate. Given. R.

No. 3. If the jury believe and find from the evidence that General Lyon was, on the 15th June, 1861, in the military command of the city of St. Louis, and State of Missouri, and that General Sweeney was in command of, at the same time, of the United States reserve corps, and of which corps the 5th regiment was under the command of Col. Stifel, the defendant, and

Given. R.

that on or about that time an order was issued by General Sweeney, with the approval of General Lyon, directed to the defendant, commanding him to tear away and remove the building, or building material, upon the premises in question, and enter upon and hold the same for military purposes, and that the defendant, in execution of such order, and in obedience to the same, did tear away and remove the said building, or building material, and enter upon the said premises, and hold
57 the same, and that the said entry and holding under such circumstances constitute the forcible entry and detainer complained of in this action, then the plaintiff cannot recover herein, and in such case it makes no difference whether, and the jury are not permitted to inquire into whether such act was an act of military necessity, or otherwise.

Given. R.

No. 4. The jury are instructed that if the entry upon the premises in question was made by the defendant as a military act, done under military authority, and in the doing of which he was and is to be protected under the provision of the ordinance of the people of the State providing for the vacating of certain civil offices in the State, filling the same anew, and protecting the citizens from injury and harrassment, pleaded in the cause, then the subsequent detainer of said premises at any time afterwards by the defendant, if he did so detain them, cannot afford any cause of action against him, def't, under the proceedings in this cause.

Which being seen by the court were all given.

Bill of excep's.

To the refusal to give which instructions for the plaintiff, and to the giving said instructions for the defendant, the plaintiff ex-
58 cepted.

The jury then found a verdict for the defendant.

The plaintiff then filed his motion to set aside the verdict, and grant a new trial.

Mo. for new trial.

No. 1,478.—Feb'y, '66.—Motion for new trial.

HENRY DREHMAN
vs.
CHARLES G. STIFEL. } In the St. Louis cir. court, April term, 1866.

And now comes the plaintiff, by his attornies, and moves the court for a new trial for the following reasons, to wit:

1st. Because the court admitted improper and illegal testimony offered by the defendant.

2nd. Because the court rejected proper and legal testimony offered by pl'ff.

3d. Because the court gave to the jury improper and illegal instructions asked by the defendant.

4th. The court refused to give to the jury proper and legal instructions offered by plaintiff.

5th. The verdict was against the evidence.
6th. The verdict was against law.
59 7th. The verdict was against both law and evidence, and against the law under the evidence.
8th. Verdict was against the weight of evidence.
9th. Because the plaintiff was surprised by the testimony of the witness Bissell, which was in conflict with his sworn deposition on file in this cause, and which occasioned an improper verdict in this cause.
Because the verdict was for the defendant when it should have been for the plaintiff.

DONIPHAN, HUDGENS & SON,
Atty's for Pl'ff.

Bill of exc'p's.

And the motion being seen and heard by the court, is by the court overruled, to the overruling of which motion the plaintiff by his attorney excepted, and prays this his bill of exceptions to be signed, sealed, and made a part of the record herein, which is done accordingly.

SAM. REBER, *Judge.*

And afterwards, to wit, at the said April term of the general term of the said circuit court, the following further proceedings were had in this cause, to wit:

60 *Agreement filed & cont'd, &c.*

HENRY DREHMANN
vs.
CHARLES G. STIFLE.

THURSDAY, *May 31st*, 186.

Agreement filed. And by agreement of parties it is ordered by the court that the appeal herein be continued until the next term of the court.
Which agreement is in the words aud figures following, to wit:

Agreement.

In the St. Louis circuit court, general term, April, 1866.

HENRY DREHMAN, pl'ff,
vs.
CH. G. STIFEL, def't.

And now comes the parties by their attornies, and by agreement continued this cause for hearing until the next general term of this court, and each waive all exceptions that may be raised by either party by reason of said continuance, or by reason that said cause has not been tried at this term, or that the appeal may be taken at subsequent term of this court.

DONIPHAN, HUDGENS & SON,
Atty's for Pl't'ff & Appellant.
JECKO & CLOVER, AND ROBT. S. MCDONALD,
Att'ys for Defendant and Appellees.

And afterwards, to wit, at the said general term, at the June
61 term, 1866, thereof, the following further proceedings were had in this cause, to wit:

Judgment of special term affirmed.

HENRY DREHMANN
vs.
CHARLES G. STIFEL.

FRIDAY, *June 22d*, 1866.

Now come the parties by their respective attorneys, and the cour being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment rendered herein by the circuit court of St. Louis county, at special term, be in all things affirmed and stand in full force and effect, and that the defendant recover of the plaintiff the costs of this proceeding, and that execution issue therefor.

And afterwards, to wit, at the term aforesaid, the following further proceedings were had in this cause, to wit:

Bill of excep's.—Aff't for ap'l, & bond filed, & ap'l granted.

HENRY DREHMAN
vs.
CHARLES G. STIFEL.

MONDAY, *June 25th*, 1866.

Now comes the plaintiff by his attorney, and files a bill of exceptions herein, and also an affidavit for an appeal, and on his motion an appeal is allowed him to the supreme court from the judgment herein rendered; he thereupon files an appeal bond, which is approved by the court.

Which bill of exceptions, affidavit for appeal, and bond are
62 in the words and figures following, to wit:

Bill of excep's.

In the circuit court of St. Louis county, June term, 1865, in the general term thereof.

HENRY DREHMAN
vs.
CHARLES G. STIFEL.

Be it remembered, that on the (22nd) day of June, 1866, this cause came on to be heard by the circuit court of St. Louis county, before all the judges in general term; and after hearing arguments of counsel, and being fully advised of and concerning the decisions, rulings, instructions, orders overruling motion for new trial, and judgment of the court below, (being the circuit court No. 2,) the said court, in

general term as aforesaid, affirmed the decisions & judgments of the said circuit court, (room No. 3,) and thereupon rendered judgment for defendant, as fully as it was rendered below in said court. To the opinion of the said court, in said general term, affirming the judgment and decisions of the court below, & in rendering judgment for the defendant, the plaintiff excepts and prays that his bill of exception to be signed, sealed, and made part of the record, which is done accordingly.

C. B. LORD, [L. S.]
Presiding Judge. [L. S.]
[L. S.]

63 *Aff't for ap'l.*

In the St. Louis circuit court, general term, June 22nd, 1866.

HENRY DREHMAN
vs.
CHARLES G. STIFLE.

Henry Drehman, upon oath, states that his appeal from the judgment of the court is not made for vexation or delay, but because affiant beleavs that he is injured by the judgment of the court.

HENRY DREHMANN.

Sworn to and subscribed before me June 25th. '66.

F. A. H. SCHNEIDER, *Cl'k.*

Bond.

Know all men by these presents, that we, Henry Drehman as principal, and George Thorner & Adam Hendrecker as suret., are held and firmly bound unto Charles G. Steifle in the sum of two hundred and fifty dollars; for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated at St. Louis this 25th day of June, A. D. 1866.

The condition of the above obligation is such, that whereas Henry Drehman has appealed from the judgment rendered against him and in favor of Charles G. Steifel, in the St. Louis circuit court, for
64 the sum of costs. Now, if the said appellant will prosecute (his) appeal with due diligence to a decision in the supreme court, and shall perform such judgment as shall be given by the supreme court, and such as the supreme court may direct the St. Louis circuit court to give, and if the judgment or any part thereof be affirmed, will comply with and perform the same so far as it may be affirmed, and pay all damages and costs which may be awarded against by the supreme court, then this obligation shall be void, otherwise it shall remain in full force and effect.

HENRY DREHMANN. [SEAL]
GEORGE THORNER. [SEAL.]
ADAM HENDRICKER. [SEAL.]

Approved in open court June 25th, 1866

F. A. H. SCHNEIDER, *Cl'k.*

65 STATE OF MISSOURI, *County of St. Louis, ss:*

I, Frank A. H. Schneider, clerk of the circuit court of St. Louis county within and for said county, certify the foregoing transcript to be a true and correct copy of the transcript and original papers from Justice John H. Niermeyer, (except the precepts, motion for new trial, notice of setting the trial anew, and verdict, among the original papers from Justice Philip McDonald, and subpœnas from said Justices McDonald and Niermeyer,) and of the record and proceedings had in the special and general terms of the circuit court aforesaid, in the case of Henry Drehmann, plaintiff, and Charles G. Stifel, defendant, as fully as the same remains on file and of record in my office.

In testimony whereof, I hereto set my hand and affix the seal of said court, at office in the city of St. Louis, this third day of August, A. D. 1866.

[SEAL.] F. A. H. SCHNEIDER, *Clerk.*

[5-cent stamp.]

66 And afterwards, to wit, at the March term, A. D. 1867, of said supreme court, the following proceedings were had in said cause, to wit:

HENRY DREHMANN, appellant,
vs.
CHARLES G. STIFEL, respondent. } 86.

MONDAY, *April 22nd*, 1867.

Brief of respondent filed.

And afterwards, to wit, at the same term of said court, the following further proceedings were had in said cause, to wit:

HENRY DREHMANN, appellant,
vs.
CHARLES G. STIFEL, respondent. } 86.

WEDNESDAY, *April 24th*, 1867.

Now again come the parties aforesaid, by their respective attorneys, and after argument herein submit this cause to the court.

Statement and argument of respondent filed.

And afterwards, to wit, at the same term of said court the following proceedings were had in said cause, to wit:

67 MONDAY, *May 6th*, 1867.

HENRY DREHMANN, appellant,
vs.
CHARLES G. STIFEL, respondent. } 86.—Appeal from St. Louis circuit court.

Now again come the parties aforesaid, by their respective attorneys, and the court being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment rendered herein by the said St. Louis circuit court be in all things affirmed

and stand in full force and effect, and that the said respondant recover of the said appellant his costs and charges herein expended, and have execution therefor.

Opinion filed.

And afterwards, upon the ninth day of May, A. D. eighteen hundred and sixty-seven, the said appellant, by his attorney, appeared in court and filed a bond in said cause, which bond is in the words and figures following, to wit:

Bond.

Know all men by these presents, that we, Henry Drehman, George Thorner, William Baumann, and Adam Hindricker, are held and firmly bound unto Charles G. Stifel in the full and just
68 sum of one thousand dollars, to be paid to the said Charles G. Stifel, heirs, executors, administrators, or assigns; to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals, and dated this day of May, in the year of our Lord one thousand eight hundred and sixty-seven.

Whereas lately, at the March term, 1867, of the supreme court of the State of Missouri, in a suit depending in said court between Henry Drehman, appellant, and Charles G. Stifel, as appellee, judgment was rendered against the said Henry Drehman, and the said Henry Drehman having obtained a writ of error of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Charles G. Stifel, citing and admonishing him to be and appear at a Supreme Court of the United States, to be holden at Washington the first Monday of December next:

Now, the condition of the above obligation is such, that if the said Henry Drehman shall prosecute said writ to effect, and answer
69 all damages and costs if he fail to make good his plea, then the above obligation to be void, else to remain in full force and virtue.

HENRY DREHMAN. [SEAL.]
GEORGE THORNER. [SEAL.]
WILLIAM BAUMANN. [SEAL.]
ADAM HINDRICKER. [SEAL.]

Sealed and delivered in presence of—

Approved by

DAVID WAGNER,
Presiding Judge Sup. Ct. Mo.

STATE OF MISSOURI, *ss:*

I, O. T. Fishback, clerk of the supreme court held at St. Louis, of the State of Missouri, certify that the above and foregoing is a full, true, and complete transcript of the record and proceedings in said supreme court in the cause of Henry Drehman vs. Charles G.

Stifel, as fully as the same remains of record and on file in my office.

In testimony whereof, I hereunto set my hand and affix the seal of said court, at office in the city of St. Louis, this first day of August, A. D. 1867.

[SEAL.] O. T. FISHBACK, *Clerk*,
Per E. P. McCARTY, *Dep.*

[5-ct. i. r. stamp, cancelled.]

Costs of this transcript, 33$, paid by pl'ff in error's att'y.

O. T. FISHBACK, *Clerk*,
Per E. P. McCARTY, *Dep.*

70 In the Supreme Court of the United States.

HENRY DREHMANN, P. E., *v.* CHARLES G. STIEFEL, D. E. } Error to the supreme court of Missouri.

"In 1859, on the first of April, I, the undersigned, and Mr. John Koons went to Mr. Stiefel to pay the rent and the previous-tendered amounts for H. Drehmann; we saw Mr. Stiefel in the morning of the above-named date, at about seven o'clock. He agreed to meet us the same day at Mr. Drehmann's house at one o'clock, and settle everything with Mr. Drehmann. I remarked to Mr. Stiefel in my mother tongue, that he saw all the money lying before him, and why he did not want to accept it. Mr. Stiefel answered that he would come to Mr. Drehmann's house at one o'clock and settle all in good order. I was at Mr. Drehmann's house the same day until forty-five minutes past two o'clock, on April 1st, 1859, but Mr. Stiefel did not come.

"JOHN KLEINEGGER.

"Mr. John Kleinegger by Brewer Stiefel resided, both in St. Louis, Mo., as authorized by Mr. Stiefel and Mr. Drehmann spoken and heard, has with the understanding of the other authorized Mr.

"*A.* The first conversation was in English as well from me as my friend Mr. as I am not competent in the English language not enough for such business. I spoke in my mother tongue the questions to Mr. Stiefel.

71 "*B.* Are you of the opinion that the account is not correct? Answered he Stiefel all to about $7, he would acknowledge besides he Mr. Stiefel did authorize anybody to get anything on his account of Mr. Drehmann. The receipt for rent he did not accept.

"*C.* Then I said we have the money cash gold we are authorized to pay.

"*D.* Before us laid on a table a plan which Mr. Stiefel drew, remarked Mr. Stiefel that he himself wanted 50 feet of the property. I answered that we had no authority to do it.

"*E.* Then Mr. Stiefel made the following remarks: under no circumstances would he take the lease. He wanted to exchange the ground.

"He Mr. Stiefel knew well that Mr. Drehmann was not good, and to sue him for a few dollars then Mr. Stiefel threatened with his hand and forefinger. He, Mr. Stiefel, said it was his plan to use the land himself would Mr. H. Drehmann be willing to the exchange than the they would be friends as before and all would be of advantage to Mr. Drehmann.

"For the lease they would agree and cheap.

"JOHN KLEINEGGER.

"1859.

"N. B. I was three or four times at Mr. Stiefel's house.

"J. K."

STATE OF MISSOURI, *ss:*

I, O. T. Fishback, clerk of the supreme court held at St. Louis, of the State of Missouri, hereby certify that the foregoing
72 is a full, true, and complete translation of the German writing appearing on pages numbered forty-two, (42,) forty-three, (43,) and forty-four, (44,) of a transcript of the record and proceedings had in a cause lately pending in said court, wherein Henry Drehmann was appellant and Charles G. Stiefel was respondent, certified by me in obedience to the command of a writ of error to the Supreme Court of the United States, on the first day of August, 1867; and I further certify that said translation is made conformably to an order of the Supreme Court of the United States, dated December 22nd, A. D. 1868.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at office in the city of St. Louis, this twenty-third day of April, A. D. eighteen hundred and sixty-nine.

[SEAL.]

O. T. FISHBACK,
Clerk Su. Ct. Mo.,
Per JOHN F. BAIER, *D. C.*

Blue

1 Dual 182
2 Dual 497
1 Buick 405
1 " 387
4 Willys Knight 2011
6 Ford 88

Facing in our
car will keep one
impression as shown
by the arrow

SUPREME COURT OF THE UNITED STATES.

DECEMBER TERM, 1868.

No. 24.

HENRY DREHMAN, Plaintiff in Error,

Vs.

CHARLES G. STIFEL.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

BRIEF FOR THE PLAINTIFF

BY

JAMES HUGHES, OF COUNSEL.

Printed by W. H. Moore, 484 11th st.

SUPREME COURT OF THE UNITED STATES.

DECEMBER TERM, 1869.

HENRY DREHMAN,
PLAINTIFF IN ERROR,
vs.
CHARLES G. STIFEL.
No. 24.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

BRIEF FOR THE PLAINTIFF

BY

JAMES HUGHES, OF COUNSEL.

Statement of the case.

Plaintiff sued defendant before a justice of the peace in an action of *forcible entry and detainer*, and recovered judgment for the possession of the property sued for, and five thousand dollars damages, and accruing rents at the rate of sixty dollars per month, from Dec. 31st, 1863, until restitution, with costs. *Record*, p. 7.

Defendant appealed to the Circuit Court of the State, where on a trial under instructions of the Court, the finding was for the defendant. *Record*, pp. 11, 28, 29.

An appeal was taken to the Supreme Court of the State, and the judgment of the State Circuit Court affirmed. *Record*, pp. 29 and 30.

From this latter decision, this writ of error is prosecuted.

There is a section in the Constitution of the State of Missouri, or more correctly speaking, in the ordinance of the Convention, which made the Constitution, which has been supposed to control this case

The decisions of the inferior Courts, adverse to the plaintiff, are understood to be founded upon it, and it is the only ground of de-

fence relied on, in the brief of defendant's counsel filed in this Court.

At first view of the case, it is therefore fully conceded, that the defence is narrowed to a single point; that it is wholly technical, and that if allowed, it cuts off substantial rights of the plantiff, inflicts on him irreparable injury, and transfers to the defendant benefits taken from the plaintiff, and to which the defendant has no claim either in law or equity, but in the full enjoyment of which he is at this day.

The section of the Missouri Constitution, or Constitutional Ordinance referred to, is as follows:

Criminal

"SEC. 4. No person shall be prosecuted in any civil action, or continued proceeding, for or on account of any act by him done, performed or executed, after the first of January, one thousand eight hundred and sixty-one, by virtue of military authority vested in him by the Government of the United States, or that of this State, to do such act, or in pursuance to orders received by him from any person vested with such authority; and if any action or proceeding shall have heretofore been, or shall hereafter be, instituted against any person for the doing of any such act, the defendant may plead this section in bar thereof."

Points for the Plaintiff in Error.

1st. The section of the Constitution of Missouri is to be construed strictly, and as this suit was commenced before its adoption, is retrospective as to the same, and the case must be brought within the latter clause of the section, which requires the section to be specially pleaded, which is not done.

2d. There is no such authority shown by the record, in the defendant, as will bring this case within the provisions of the State Constitution; and the Circuit Court having refused (*record*, p. 26,) to instruct that such authority was necessary. (*See instruction* 6 refused,) to which exception was taken—The Supreme Court of the State ought for that reason, to have reversed the judgment, and this Court ought to do it now.

3d. *Instructions* 1, 2, 3 and 4 (*record*, pp. 26, 27) given for defendant and excepted to, are each, severally, erroneous: First. Because they and each of them deny to the jury the right to judge of the public exigency on which the property was seized, and—Second. Because they and each of them exclude the jury from con-

sidering whether or not upon the evidence the alleged order was fraudulently procured by the defendant for his own purposes.

4th. The section of the State constitution relied on by the defendant, is, as to this action, an *ex post facto* law, and therefore inoperative and void.

5th. The section of the State Constitution relied on by the defendant, if applied to this case would be, and have the effect of, a law impairing the obligation of contracts, and is, therefore, in this suit inoperative and void.

NOTE.—All the authorities relied on to support the points stated in this brief, are cited in the printed argument filed in the cause.

JAMES HUGHES,
Of Counsel for Plaintiff in Error.

SUPREME COURT

OF THE

UNITED STATES.

Henry Drehman, Plaintiff, in Error,
vs.
Charles G. Stifel, Defendant, in Error.

ARGUMENT OF JOHN P. HUDGENS,

For Plaintiff, In Error.

1869
CHARLESS PUBLISHING COMPANY, PRINTERS.
300 and 302 North Main Street.

SUPREME COURT OF THE UNITED STATES.

Henry Drehman, Plaintiff, in Error,

vs.

Charles G. Stifel, Defendant, in Error.

ARGUMENT OF JOHN P. HUDGENS,

J. C. Moudey *For Plaintiff, In Error.*

May it please the Court ·—

This case is brought here from the Supreme Court of Missouri, by writ of Error, under the 25th section of the Judiciary act of 1789. The action was a forcible entry and detainor, under the statutes of Missouri—commenced on 22nd September, 1863, to recover from the defendant the possession of a house and lot in the city of St. Louis, with the value of the rents and profits, and damages for the injury done to the premises, during the time they were detained by the defendant, since the 15th of June, 1861.

The facts appearing in this record are substantially as follows:

Drehman and Stifel were both lessees of Mrs. Mary L. Tyler, of adjoining lots in the same block.

Drehman's lease was made April 1st, 1854, for *twenty years, ending April 1st*, 1874. Stifel, the respondent, erected a brewery on his premises, while his neighbor, Drehman, erected a grocery

store, dwelling, and other out-houses, on his. Stifel prospered in his business, so that prior to 1861 he had an extensive brewery covering the entire grounds. and encroaching upon Drehman so that it became indispensably necessary to Stifel's increasing business to possess Drehman's lot. He purchased the reversion of his own leasehold, and also secretly purchased the reversion of Drehman's lot from Mrs. Tyler's agent and attorney, in fact who had a general power of attorney to sell for her, knowing that Drehman had already made application to Mrs. Tyler to complete his own title by purchase of the reversion.

Drehman's lease had over thirteen years to run after Stifel had purchased the reversion and substituted himself as Drehman's landlord. Drehman, as soon as the rent became due under the lease, tendered it to Stifel as his new landlord. Stifel refused to receive the rent, and demanded the immediate possession of the premises, saying, in presence of witnesses Coons and Klennigger, *"he did not want the money, but wanted the ground; and if Drehman does not consent to that I will fix him."* These declarations were made at different times in February, March and April, 1861. Drehman continued in possession after his threat until some time in May following, when his house was fired from the outside, next to his threatening neighbor Stifel, and so damaged by the fire as to be untenantable. He immediately began to repair, when Stifel appeared in his new assumed character of Colonel of Home Guards—a self-constituted and unauthorized organization, being without authority of law—and, with his posse of a dozen men stationed in his brewery, forbid Drehman to repair or come near his house, and completed the destruction commenced by the fire. Stifel gave some of his men doors, and others window shutters, and such parts of Drehman's house as each wanted, and which they carried to their respective homes. This was on the 15th of June, 1861. Stifel tore down all the houses and filled up the cellar and cistern, and enclosed the lot in his brewery yard, and having accomplished all the "home guarding" necessary at that place, the men, after about 15 days, were removed elsewhere, and Stifel has retained forcible possession of Drehman's lot to this day, not for public use or military necessity, but covered over since with his beer casks and barrels, where in June, 1861, stood the humble "castle" of poor Drehman; whence he was

"threatened," then "smoked out," and finally driven at the point of the bayonet, by the command of Colonel Stifel, leaving the ruins of all he possessed in possession of this "home guard!" Thus, what Stifel failed to accomplish as a brewer and civilian, for his own private gain toward carrying out his threat "to fix" Drehman, he easily accomplished as Colonel, and having succeeded, he returned to the business of brewing, with the coveted lot of Drehman, adding the necessary increased facilities to supply the increased demand for his "lager beer."

Thus matters continued, when in September, 1863, the appellant brought this action to recover possession of his lot, with damages for the injury and detention since June 15th, 1861. Upon a trial by jury before Justice McDonald, September 28th, 1863, a judgement was rendered for plaintiff for possession, and about $7,000 damages. Stifel, by his attorney, procured a new trial, and then a change of venue to Justice Niermeyer. At this stage of the case, Stifel appealed to the military authorities, and by representations of his counsel ex parte, prevailed upon General Schofield, commanding the department, to issue the following order:

HEADQUARTERS DEPARTMENT OF MISSOURI,
ST. LOUIS, Mo., November 27, 1863.

To Henry Drehman, St. Louis, Mo.:

SIR: It having been made to appear to the satisfaction of the Commanding General of this Department that, in the forcible entry and detainer of your premises, for which you have brought an action against Charles G. Stifel, now pending before John H. Niermeyer, Esq., Justice of the Peace in and for the Ninth Ward, in the city of St. Louis, the said Stifel was, at the time of the commission of the grievances complained of, the Colonel of the Fifth Missouri Volunteer Infantry, under the command of Brigadier General Sweeney, and the said Stifel, as such Colonel, took and held possession of your premises in obedience to the orders of General Sweeney, his superior officer, you are hereby commanded to desist from the further prosecution of your said action.

By command of Major General Schofield.
O. D. GREEN,
Assistant Adjutant General.

Under this order further proceedings were suspended until plaintiff procured a hearing before General Schofield, when the order was revoked by the following indorsement thereon; (Tr. p. 6.)

HEADQUARTERS DEPARTMENT OF THE MISSOURI,
December 5th, 1863.

The within order is hereby revoked.

By order of Major-General Schofield.

J. A. CAMPBELL, A. A. G.

Justice Niermeyer then proceeded with the case, and again summoned twelve jurymen, who, on the 31st December, 1863, again rendered verdict for plaintiff for possession and about $7,000 damages. From which Stifel appealed to the St. Louis Land Court, now Circuit Court, where the case was continued from term to term by the respondent, on the pretext of absent witnesses, until May, 1866, when the same came up for fair trial in the Circuit Court before Judge Reber.

Pending the delay occasioned by the appeal and continuances procured by the respondent, the State Convention met on the 6th January, 1865. and on the 17th March, 1865, adopt and an ordinance entitled, "*An ordinance providing for the vacating* certain offices in the State; filling the same anew and *protecting the citizens from harrassment.*" The second section of which was made the fourth section of Article XI of the new Constitution, which is as follows;

Section 4. No person shall be prosecuted in any civil action for or on account of any act by him done, performed or executed, after the first of January, one thousand eight hundred and sixty-one, by virtue of military authority vested in him by the Government of the United States, or that of this State, to do such act, or in pursuance to orders received by him from any person vested with such authority; *and if any action or proceeding shall have heretofore been, or shall hereafter be, instituted against any person for the doing of any such act, the defendant may plead this section in bar thereof.*

On the trial in the Circuit Court the above facts substantially appeared, so far as the Court would permit them to be given to the jury; when the respondent proved by witness Bissell that one General Sweeney, of the *Home Guard* organization, ordered

or gave Stifel a *permit at his (Stifel's) own request to take possession* of and destroy *these premises.* The respondent then plead this ordinance, or section four of Article XI, of the Constitution, "in bar of this action, which was commenced more than "two" years before the ordinance passed; and the Court sustained the plea in bar by giving the instructions asked by defendant and refusing those asked by the plaintiff.

The instructions given by the Court at the instance of the defendant as its construction of the ordinance plead in bar of this action are as follows:

1. If the jury believe and find from the evidence in the cause that the act of forcible entry and detainder complained of in this action against the defendant was an act by him done, performed and executed after the first day of January, 1861, by virtue of military authority vested in him by the Government of the United States to do such act, or was by him so done, performed and executed in pursuance to an order received by him from a person vested with authority, then the plaintiff is not entitled to recover in the suit, and your verdict should be for the defendant.

2. The jury are instructed that if General Sweeney, with the approval of General Lyon, issued a military order for the tearing away and removing the premises in question directed to the defendant, if the defendant was at said time in the military service of the United States Government, and subject thereby to the authority of said Generals, then the matters of "how said or- "der was procured, or at whose instances, or upon what circum- "stances cannot be considered by them," for the order when issued by competent authority is a justification for the doing of the act by a military subordinate.

3. If the jury believe, and find from the evidence that General Lyon was on the 15th of June, 1861, in military command of the city of St. Louis and State of Missouri, and that General Sweeney was in command at the same time of the United States Reserve Corps, and of which corps the 5th regiment was under the command of Colonel Stifel, the defendant, and that on or about that time an order was issued by General Sweeney with the approval of General Lyon directed to the defendant, commanding him to tear away and remove the building or building material upon the premises in question, and enter upon and hold the same for mili-

tary purposes, and that the defendant, in execution of such order, and in obedience to the same, did tear away and remove the building or building material and enter upon said premises and hold the same, and that the said entry and holding under such circumstances constitute the forcible entry and detainder complained of in this action, then the plaintiff cannot recover herein, and in such case it makes no difference whether such act was an act of military necessity or otherwise.

4. The jury are instructed that if the entry upon the premises in question was made by the defendant as a military act, done under military authority, and in the doing of which he was to be protected under provisions of the ordinance of the people of the State, providing for the vacating of certain offices in the State, filling the same anew and protecting the citizens from injury and harrassment, pleaded in this case the "subsequent detainder" of the premises· "at any time after" by the defendant, if he did so detain them, "cannot afford any cause of action" under the proceedings in the cause.

The instructions refused by the Court will also throw some light on the Court's construction of the ordinance. Those material upon this question are as follows:

4th. If the defendant was a military officer of the State or United States he might lawfully have taken possession of the property of plaintiff to prevent it from falling into the hands of the enemy; but in order to justify the seizure for that purpose the danger must be immediate and impending, and not remote or contingent. He might also have taken them for public use and impressed them into the public service; but in order to justify such taking there must have been an immediate and pressing danger, or urgent necessity existing at the time, but not otherwise. And unless the defendant has shown the necessity or emergency existing at the time of the alleged order, and destruction of plaintiff's property, it is no defence or justification, and the jury must find for the plaintiff."—19 Curtis, U. S. S. C., R. 427."

"5th. The second section of the ordinance plead in bar of this action is a law retrospective in its operation and in violation of the Constitution of the State of Missouri existing at the time of the passage of said ordinance and not of validity."—3 Dallas,386; 2 Gall, 139; 7 John, 477: Sedg. on Stat. and Con. L. 188."

"6th. Although the jury may believe from the evidence that defendant took possession of the premises of the plaintiff, an destroyed the improvements thereon in pursuance of and order from one Lyon or Sweeney, or the witnes, Bissell, under whom the defendant was acting in a subordinate capacity. Yet, unless he shall have shown an authority from the government of the State or United States, 'vested' in said Lyon, or Sweeney, or Bisssll, or defendant at the time the act was done, 'to do the act,' then the ordinance is no protection to the defendant and the jury must find for plaintiff."

"8th. The 2d section of the ordinance plead in bar of this action is a bill of attainder within the meaning of the Constitution of the United States and of no validity."

To the refusal of the instructions asked by the plaidtiff, and the giving of those asked by defendant, the plaintiff excepted at the time.

The jury were required to find for the defendants, which they did without argument. The Supreme Court of Missouri affirmed this construction of the ordinance as a bar to the action, and gave judgment against the plaintiff for all the costs of the suit—not only such costs as accrued since the passage of the ordinance, but all the costs which accrued before its passage in the trials which resalted in judgements against the defendant.

Plaintiff now assigns as errors:

1st. That the ordinance, of section 4, of Article XI, of the Constitution of Missouri, plead in bar of this action, is a bill of attainder, within the meaning of the Constitution of the United States, and of no validity.

In the case of Cummings, vs. the State of Missouri, 4 Wal. 277, the kindred provisions of this new Constitution were thoroughly reviewed by this Court, and declared to be a bill of attainder, in the milder form of pains and penalties. This ordinance is the 4th section of the same Constitution, and part of the machinery intended by the Convention to deprive the same class of persons of their property and rights of action against another class of persons, which they intended to favor.

The case of Cummings fell under the class of proscribed Priest which the convention undertook to divest of their property in a profession. The case at bar falls under the class of persons forbidden to prosecute claims for loss of property, and provides

a bar to their suits if pending when the ordinance passed. The motive in each case was the same—the puuishment of a class supposed to be inimical to the interest of the convention. It is true the act does not impute any crime to the plaintiff, or his class, but it deprives him of his property nevertheless, without a judicial trial. The result is the same as though it had imputed a crime.

If the convention had declared, by ordinance, that Henry Drehman had committed treason, and that because of his crime his property was forfeited, and his right of action against the defendant barred, this would unquestionably have been a "bill of pains and penalties." Is it any less a bill of pains and penalties when it inflicts the penalty without imputing the crime as a foundation?

We insist that the reason of this rule is the same in each case, and that the ordinance is as effective a bill of pains and penalties as though it had directed the forfeiture of Drehman's property for an imputed crime. The imputation of a crime was not an essential element of a bill of attainder, but the mere pretext for the attainder. It was part of the form, but not material to the substance. Does the Constitution then prohibit the bill of attainder with a crime imputed as a pretext, and permit a legislative enactment containing all the essential elements of attainder, when there is no pretext assigned.

On this question this Court in the case of Cummings vs. State of Missouri, after supposing several examples of bills of pains and penalties, and comparing them with the case of Cummings says: "The deprivation is effected with equal certainty in one case as it would be in the other, but not with equal directness. The purpose of the law maker in the case supposed, would be openly avowed; in the case existing it is only disguised. The legal result must be the same, for what cannot be done directly cannot be done indirectly. The Constitution deals with substance, not with shadows. Its inhibition was leveled at the thing, not the the name. It intended that the rights of the citizen should be secure against deprivation for past conduct by legislative enactment, under any form however disguised. If the inhibition can be evaded by the form of the enactment, its insertion in the fundamental law was a vain and futile proceeding."

Wooddesson in his lectures on bills of pains and penalties (36, Law Libray, p. 516, note F.) says: "Under the heads comprised "in this chapter, may be considered acts of indemnity, to exempt "particular persons from the penalties to which they are liable "by the law, divorce acts (Sup. vol. 1, 235), and many other acts "of an occasional nature."

If Mr. Wooddesson is correct, then this ordinance is just such a bill of pains and penalties as he describes. It both exempts a "particular" person from liabilities incurred by him, and punishes another "particular" person by depriving him of his property without judicial process.

We have it then as settled by these cases that "a bill of pains and penalties is a law which declares a person's estate confiscated or creates a forfeiture of some right without giving him the opportunity of being heard in the judicial tribunals of the country. It is a bill or law, which by its own force inflicts the wrong complained of."

Then let us see if this ordinance forfeits any right of the plaintiff. If it does it is prohibited by the Constitution of the United States.

It is admitted that plaintiff had the right to the property since 1854, by lease extending until 1874; that plaintiff obtained two judicial determinations of that right in this cause in 1863; that an appeal was taken by the respondent from these judicial determinations to the Circuit Court, and pending an appeal this ordinance, or section four, was adopted by the Convention. Since the adoption of the ordinance, the Court says by its instructions that plaintiff now has "no right" to the property, or that the the respondent is protected by the ordinance in forcibly depriving the plaintiff of his property, and "the subsequent detainer of the property cannot afford any cause of action under the proceedings in this cause." Respondent has forcibly detained the premises now over six years, yet the Court says, under the ordinance, this detainer affords no cause of action to the plaintiff. Why? Because the ordinance, as construed by the Court, deprives him of his right to maintain this cause of action which he possessed and enforced before the ordinance was passed. Not only this cause of action, but it deprives him of the right to recover the property at any time in the future, because "the sub-

sequent detainer affords no cause of action," says the Court, and if the subsequent detainer affords no cause of action, then plaintiff can never recover the property and his right is thereby forfeited.

It is then, as construed by the Court, clearly a bill of pains and penalties, prohibited by the Constitution of the United States, and of no binding force.

2. "The ordinance, or section 4, article XI, is a law impairing "the obligation of contracts in violation of the Constitution of "the United States, and of no validity."

The contract in question was an indenture, or written lease of real estate, made by Mrs. Tyler to the plaintiff in 1854, for a term of twenty years. Defendant in 1860 purchased the fee of the premises in dispute of Mrs. Tyler, and became thereby the landlord of plaintiff, and assumed her obligations in this contract.

Among the obligations assumed by the defendant in said lease, was one providing that "The said party of the first part (meaning the defendant) hereby agrees to keep the said second party (meaning the plaintiff) in the lawful possession of said leased premises during this lease," &c. (Tr. p. 17). This then was one of the defendant's obligations and part of the contract. The laws of the State of Missouri concerning landlords nnd tenants, in force when the contract was made, and when this suit was commenced, forms a part of the contract. The contract was made in reference to the law which provides certain remedies for enforcing the contract, and protecting their respective rights as landlords and tenants.

In June, 1861, defendant took forcible possession of these premises in violation of the contract, destroying plaintiff's valuable improvements, and has ever since detained the possession of the premises from the plaintiff. This action was commenced in 1863 to recover the possession of the premises—to recover the value of the rents of the premises during the time they were detained by the defendant; and to recover the value of the improvements which the defendants had destroyed. These liabilities were assumed by defendant under the original contract and the laws then in force. In 1863, the judicial tribunals established by these same laws, and which had full jurisdiction of the cause, and parties after a regular trial in due form of law, rendered a judgment

against the defendant, and in favor of the plaintiff—for possession, rents, damages and costs, found to be due under the contract and the laws then in force. The ordinance plead in bar of this action, was passed in 1865—eleven years after the contract was made, four years after the breach alleged, and liabilities had accrued, and two years after judgement had been twice rendered in this cause in favor of the plaintiff. Yet the Court says the ordinance, by its retrospective operation is now a complete bar and defense to this action. Then does it not impair and annul the obligations of the contract. Before the ordinance was passed defendant was adjudged to owe plaintiff $7,000 upon his obligation assumed in this contract. Since the passage the courts say there is no liability—the ordinance is a complete bar, and furnishes a new defense.

In the case of Sturgis vs. Crowninshield, 4 Wheat. 122, plaintiff sued the defendant on a promissory note. Defendant pleaded in bar of the action, a discharge, under a bankrupt law of New York, passed subsequent to the making of the note. Mr. Chief Justice Marshall, delivering the opinion of the Court, says: "This opinion rendered it totally unnecessary to consider the question, whether the law of New York is, or is not, a bankrupt law; we proceed to the great question on which the cause must depend. Does the law of New York, which is pleaded in this case, impair the obligation of contracts, within the meaning of the Constitution of the United States? This act liberates the person of the debtor, and discharges him from all liability, for any debt previously contracted, on his surrendering his property in the manner it prescribes. In discussing the question whether a State is prohibited from passing such a law as this, our first inquiry is into the meaning of words in common use, what is the obligation of a contract? and what will impair it? It would seem difficult to substitute words which are more intelligible, or less liable to misconstruction, than those which are to be explained.

A contract is an agreement, in which a party undertakes to do, or not to do, a particular thing. The law binds him to perform his undertaking, and this is, of course, the obligation of his contract. In the case at bar, the defendant has given his promissory note to pay the plaintiff a certain sum of money, on or

before a certain day. The contract binds him to pay that sum on that day; and this is its obligation. Any law which releases a part of this obligation, must, in the literal sense of the word, impair it. Much more must a law impair it which makes it invalid, and entirely discharges it.'" * * * If in a State where six years may be pleaded in bar of an action of assumpsit, a law should pass declaring that contracts already in existence, not bound by the statutes, should be considered to be within it, there could be but little doubt of its unconstitutionality." * * * * "But if a law should declare that contracts already intered into and reserving the legal interest, should be usurious and void, either in whole or in part, it would impair the obligation of the contract, and would be clearly unconstitutional."

The Court declared the law within the constitutional inhibition and void because it impaired the obligation of contracts made before its passage. The same doctrine was held in a similar case of McMillan vs. McNeill, 4 Wheat, 209. Ogden vs. Saunders, 12 Wheat, 213. And Farmers' and Mechanics' Bank, of Pennsylvania, vs. Smith, 6 Wheat, 131,

In the case Green vs. Biddle, 8 Wheat, p. 1,the Supreme Court of the United States say: "It is no answer that the acts of Kentucky now in question are regulations of the remedy and not of a right to the lands. If these acts so change the nature and extent of existing remedies, as materially to impair the rights of the owner, they are just as much a violation of the compact, as if they directly overturned his rights and interests."

In the case of Bronson vs. Kinzie, et. al., 1 Howard, U. S. R. 311, the Court adopt and approve this rule, and say; "Whatever belongs merely to the remedy may be altered according to the will of the State; provided, the alteration does not impair the obligations of the contract. But if that effect is produced it is immaterial whether it is done by acting on the remedy or directly on the contract itself. In either case it is prohibited by the Constitution."

In the case of Hawthorne vs. Calef, 2 Wallace, 10, it is held by the Court that a statute repealing a former statute which made the stock of stockholders in a chartered company liable to the corporations debts, is as respects creditors of the corporation

existing at the time of the repeal, a law impairing the obligation of the contract, and void. The same rule is laid down in Wood ruff vs. Trapnal, 10 Howard, 190; and Curran vs. State of Arkansas, 15 Howard, 304.

In the case of Dash vs. Van Kleeck (7 Johnson, R. 490), the Supreme Court of New York say; "It is not necessary to inquire whether the legislature can, by the plentitude of its power, annul an existing judgment. This power I should undoubtedly deny, because there then immediately arises a contract against the party adjudged to pay a sum of money in favor of him to whom it is awarded." At page 496 of same case, Justice Thompson says: "Lord Coke lays down the rule to be (Co. Litt. 360 A.), that acts of Parliament are to be so construed as that no man who is innocent, or free from injury or wrong, shall by a litteral interpretation be punished or endangered." He continues; "Giving to the act now under consideration a retrospective operation would manifestly be productive of these consequences, for it not only takes away a vested right but punishes and endangers the plaintiff in the payment of costs. If his action is defeated and his right of recovery taken away by this statute he not only loses his own costs but will be obliged to pay costs to the defendant." P. 498. He continues: "In the case of Ogden vs. Blackledge (2 Cranch, 272) in the Supreme Court of the United States, the effect and operation of an explanatory statute was under consideration. In that case as in this (continues Justice Thompson, and so in case at bar), the statute was passed after the commencement of the suit. And it was urged by counsel that if suit had been brought after the passage of the explanatory act it would not alter the past law and make that to have been law which was not law at the time. To declare what the law is or has been is a judicially power; to declare what the law shall be is legislative. One of the fundamental prlnciples of all governments is that the legislative power shall be separate from the judicial. But that, at all events, the statute could not affect that suit, which was brought before the law was passed. The Court stopped the counsel considering the question as too plain to be argued." Chief Justice Kent, in delivering his opinion in the case (page 500, et. seq.) reviews at length the various English and American authorities upon the qestion of retrospective laws. After endorsing fully

the opinion of Justice Thompson, at 508 says; "The Judges of the Supreme Court of the United States,in the case of Calder vs. Bull, (3 Dallas, 386,) speak in strong terms of disapprobation of such laws; and in Ogden vs. Blackledge, (Cranch, 272,) they considered the case too plain for argument,—that a statute could not retrospect, so as to take away a vested civil right. This train of authority, declaratory of the common sense and reason of the most civilized States, ancient and modern, on the point before us, is sufficient, as I apprehend, to put it at rest, and to cause not only the judicial but even the legislative authority to bow with reverence to such a sanction."

In 1835 the Penhsylvania legislature passed an act to the effect that "every last will and testament therefore made or thereafter to be made, except such as has been finally adjudicated, to which the testator's name has been subscribed by his direction, or to which he had made his mark or cross, should be deemed and taken to be valid." This was held to be a special act or legislative judgment made in the assumption of judicial magistracy, and void. (11 Pa. S. R. 494.)

In 1843 the same legislature enacted that a certain Sheriff's deed should be considered valid. The same ruling was made as in the last case (33 Pa. S. R., p. 496), and the Court remark "that the law which gives character to a case, and by which it is to be decided, is the law which is inherent in the case, and constituted part of it, when it arose as a complete transaction." * * * "If this law be changed or annulled, the case is changed and justice denied, and the due course of law violated." * * * "In the very nature of things, a law that is enacted after a case has arisen can be no part of that case. Such a law must produce an untrue decision—a decision not of a case arising between the parties as it ought to be, but a case partly created by the legislature." And such also was the ruling upon an act which authorizen a guardian to sell a minor's lands and pay the ancestor's debt (10 Yerger, 59); an act authorizing a person to sue without letters of administration (5 Yerger, 320); an act creating a special Court to try certain causes in a certain way, directed by the act (2 Yerger, 499); an act dismissing certain suits (Ib. 554); an act empowering one to revive a judgment, as if he was executor (4 Yerger, 202); an act directing a disposition to be read on

a trial (1 Chipman, 237); an act prohibiting an injunction (5 Cala, p. 73); an act removing an officer without cause (1 Dev. p. 1); an act garnting leave to answer after default (4 R. I., 324); an act declaring the meaning of a law (5 Humph., 165); an act taking away an appeal (5 Ark., 358); an act granting a new trial (1 N. Hamp., 199).

Applying their principles to the case at bar, can there be any question that the retrospective operation of this ordinance upon the rights of the plaintiff, impairs his contract with the defendant. If a State cannot pass a bankrupt law discharging a debtor from his pre-existing obligations, can the ordinance be held to discharge the defendant from his lability to plaintiff, and be a valid law? What cannot be done directly, cannot be done indirectly.

If the State could not discharge defendant from all his debts, can it discharge him from any part of his debts or liabilities to other individuals?

Judge Holmes in his opinion in this case says:

"So far as this ordinance affects the plaintiff's case, it may be conceded, that it operates to make such military orders and authority a complete justification for the acts done by the defendant in pursuance thereof." * * * "So far as the ordinance operates retrospectively upon the plaintiff's case, it may be said to deprive him of his right to recover, but does not take away nor infringe any vested right of property." * * * "It operates so far to change the rules of evidence. It makes that a justification and a defense which would not have been such before without further proof." * * * "The ordinance thus far makes a change in the law as it stood before, but we do not think it is for this reason unconstitutional."

Thus, while the Supreme Court of Missouri admit that this ordinance did change the respective rights of the parties by providing for defendant a new defense and justification, which could not have been made before the ordinance was passed, and which deprived plaintiff of his right of action, and was an act of "indemnity," "oblivion," and "pardon," for the defendant from all his pre-existing liabilities—more effective in its terms than any act of bankruptcy, for the ordinance did not require the defendant to surrender any of his property, not even that which he unlawfully withheld from the plaintiff. Yet the Court says while

the ordinance does discharge defendant from previous liability to plaintiff, "they do not think it is for that reason unconstitutional."

At the time the defendant seized the private property of the plaintiff in June, 1861, he could not have acted by authority of the State of Missouri, because this Court will take judicial knowledge of the fact from the public history of the country (Grl Ev. 4, 5, 6), that at that time there was no loyal government in Missouri under which he could act as a Colonel of Home Guards."

If he had any military authority, or acted under one having such authority, it must have been under the authority of the United States. Rightful authority could come at that time from no other source. Then it is important to know under what circumstances the United States authorized its military officer to seize private property as an act of the government, and when a seizure by an officer is unauthorized, and an individual trespass of the officer for which he is individually liable. Plaintiff insisted in the Court below that the adjudication of this question, made by this Court before the ordinance was passed, should furnish the rule to determine whether the act was done by authority of the United States or not. But the Court has held that the ordinance by its own force determined the question in favor of the defendant, and therefore, was a complete bar to this action.

These questions have been fully settled by the Supreme Court of the United States in the case of Harmony vs. Mitchell, (19 Curtis, 427). Harmony accompanied Colonel Doniphon's expedition into Mexico in the late war with that country, carrying with him a large amount of sutler's goods designed to trade with the Mexicans. On approaching Chihuahua, Harmony attempted to leave the expedition, and Colonel Mitchell reported the fact to Colonel Doniphan, who had the superior command, and recommended that he should be forbidden to leave the command as his supplies would fall into the hands of the enemy. Colonel Doniphan gave the order compelling him to remain with the expedition in its march, and detaining his goods, and Colonel Mitchell executed it. Harmony finally lost his goods, and after the war sued Colonel Mitchell in New York for the value of the goods lost in Mexico after Colonel Mitchell's seizure under Colonel Doniphan's order.

Mitchell defended upon the ground that he acted under the order of his superior in command; that the seizure was an urgent necessity for the public good and to prevent them from falling into the hands of the enemy.

Chief Justice Taney, delivering the opinion of the Supreme Court of the United States says; "There are occasions in which private property may be lawfully taken or destroyed to prevent it from falling into the hands of the public enemy; also where a military officer, charged with a particular duty, may impress private property into the public service or take it for public use Unquestionably the Government is bound to make full compensatioe to the owner. But we are clearly of opinion that in such cases the danger must be immediate and impending, or the necessity urgent for the public service, such as will not admit of delay, and when the action of the civil authority would be too late in providing the means which the occasion calls for." Again he says; "But it is not sufficient to show that he exercised an honest judgment, and took the property to promote the public service; he must show by proof the nature and character of the emergency, such as he had reasonable grounds to believe it to be, and it is then for a jury to say whether it was so pressing as not to admit of delay, and the occasion such, according to the information upon which he acted, that private right must for the time give way to the common and public good." Again he says: "The case mentioned by Lord Mansfield, in delivering his opinion in Mossyn vs. Fabrigos (1 Cowp, 180,) illustrates the principle of which we are speaking. Captain Gambier of the British navy, by the order of Admiral Boscowen, pulled down the houses of some settlers on the coast of Nova Scotia, who were supplying the sailors with spirituous liquors, the health of the sailors being injured by frequenting them. The motive was evidently a laudable one, and the act done for the public service. Yet it was an invasion of the right of private property and without authority of law; and the officer who executed the order was held liable to an action, and the settlers recovered damages against him to the value of the property destroyed. This case shows," continues she Chief Justice, "how carefully the rights of private property is guarded by the laws in England, and they are certainly not less valued nor less securely guarded under the Constitution and laws of the United States."

In disposing of the plea of the defendant, Mitchell, that he acted under the orders of his superior in command, Colonel Doniphan, the Supreme Court say on page 429:

The fifth point may be disposed of in a few words. If the power exercised by Colonel Doniphan had been within the limits of a discretion confided to him by law, his order would have justified the defendant, even if the commander had abused his power or acted from improper motives; but we have already said that the law did not confide to him a discretionary power over private property. Urgent necessity would alone give him the right; and the verdict finds that this necessity did not exist. Consequently the order given was an order to do an illegal act; to commit a trespass on the property of another; and can afford no justification to the person to whom it was executed. The case of Captain Gambier, to which we have just referred, is directly in point upon this question. And upon principle, independent of this weight of judicial decisions, it can never be maintained that a military officer can justify himself for doing an unlawful act by producing the order of his superior. The order may palliate but it cannot justfy.

But in this case the defendant does not stand in the situation of an officer who merely obeys the command of his superior, for it appears that he advised the order, and volunteered to execute it, when, according to military usage, that duty more properly belongs to an officer of inferior grade."

In this case the Court held Colonel Mitchell to a strict accountability to the civil law, and to a respect for private property and refused his plea of necessity for the public good, on the ground that no sufficient necessity was shown to exist, and refused his plea of justification, by producing the order of his superior, on the ground that his superior had no such authority and the order was no justification. Yet the Court, in the case at bar, say that the order alone of respondent's superior officer was a justification to him, since the passage of the ordinance, without any necessity being shown; "and the matter of how said order was procured, or at whose instance, or upon what circumstances cannot be considered by them (the jury), for the order, when issued by competent authority, is a justification for the doing of the act by a military subordinate," and it makes no difference whether such act was an act of military necessity or otherwise."

In the case of William S. Grant vs. the United States, tried at the October term, in 1863, of the United States Court of Claims, Judge Wilmot, in delivering the opinion of the Court, after stating that the claim was for private property of William S. Grant, a contractor of the Government, destroyed and abandoned in Arizona, on the 15th of July, 1861, by order of Captain Moore, commanding United States troops in the vicinity of Tucson; "We must come to consider the necessity under which this property was destroyed. It is necessity alone that gives the right to take private property for use or destruction. The danger must be threatening, such as demands immediate action, and when delay would work public injury. Unless the necessity is such as to justify the officer he is a trespasser and there is no liability on the part of the Government. * * * If, however, the danger, as he ought to have seen, was remote, the necessity not pressing, Courts will hold him personally responsible to the party aggrieved."

This is exactly what we wished to do in this case, to hold the defendant persanally responsible, because he does not pretend there was any necessity for his act, which is an indispensible prerequisite to support a claim against the government. Plaintiff has no shadow of claim against the United States because necessity alone gives the right to take private property for use or destruction, and unless the necessity is such as to justify the officer he is a trespasser and there is no liability upon the part of the Government.

The fourth instructions asked by plaintiff declares the law under which private property may be taken, as expounded in the foregoing cases by the highest tribunals of the Government, and plaintiff insists is the only admissible construction of the law. Applying this rule of construction: did the respondent do the act by virtue of military authority vested in him by the United States or in pursuance of an order from one vested with such authority? To be vested with or have such authority there must have been urgent, immediate and impending necessity, such as would not admit of delay. Unless such existed the officer had no authority to do the act, or command it to be done, and was a trespasser and personally liable as such. If the necessity existed snfficient to justify the officer, his authority to do the

act was rightful and the liability of the Government established, and the provision in the bill of rights providing that private property shall not be taken without just compensation, is saved, because the government is bound to make compensation for property rightfully taken by its authority.

The principal that an illegal order of a superior to an inferior officer is no justification to such inferior or subordinate officer has long been recognized in cases of civil officers.—10 Peters, U. S. R., 81. Sedgwick on Damages, 486.

These principles have never been denied, and we undertake to affirm that the case before the Court stands upon its own record without a judicial precedent to sustain the Court below.

The respondent claims to have been in June, 1861, the Colonel of an organization called Home Guards. This organization was without warrant or authority of law. There was not then, nor is there now, any law of the United States or of this State authorizing any such organization. It was assumed voluntarily upon the part of the respondent, being without authority of law the respondent could not in any case have military authority to do the act complained of, when he had no rightful authority whatsoever to do any military act on behalf of the State or United States. He voluntarily assumes to be colonel, then assumes the right to tear down dis neighbor's house and destroy the premises, under the pretext that the Government of the United States wanted this thirty by one hundred and forty feet of ground to drill his undisciplined, self-constituted organization. The Government did not know of any such organization at the time and has never recognized it since. Was there no vacant ground about St. Louis suitable to drill this squad of a dozen men in military tactics without destroying private houses, and was the necessity for this act sufficient to justify the officer? But we will not pursue this pretext farther. The absurdity is too plain for argument.

The Court refused the proofs of respondent's acts prior to 15th June, 1861, because it says the ordinance was a justification for such acts and dispensed with such proofs. These acts were competent to show that the act complained of was not an act of, or aushorized by the State or United States.

The ordinance had been plead in bar, and plaintiff offered tes-

timony of respondent's threats to "fix plaintiff," Drehman, if he did not surrender the premises, and tending to show Stifel's efforts to get possession of the premises before he assumed to be colonel or was connected with this assumed military organization. The testimony clearly showed that it was the act of Stifel for his own individual benefit, contemplated long before the military pretext was conceived, and in no sense an act authorized by the Government. It was also competent to show the motives and circumstances that surrounded respondent at the time of the act. The only evidence on record in rega-d to any military order is that of the witness, Bissell, who testifies that Colonel Stifel requested or suggested to him to get General Sweeney, another home guard general, to issue this order, and he testifies that it was merely a verbal order, given on the suggestion of the respondent, and amounts to nothing more than a verbal permit from one without authority to commit a trespass. Chief Justice Taney disposes of this question in the above extracts from his opinion. It would not be considered as an order under any circumstances, for it was at his own suggestion and for his own benefit, voluntarily assumed. Was there ever a more flagrant prostitution of the objects and ends of a Court designed to administer justice; of an organization pretending to guard the homes of the citizens from mob violence, or of a convention assembled to provide a more perfect government to protect the inalienable rights of its citizens, among which it declares are "life, liberty, the enjoyment of the fruits of their own labor, and the pursuits of happiness."

It is claimed by the respondent in this case, and the Court sustains the assumption, that an assumed or real military officer has the power in this civilized country to dispense permits, or indulgences, if you please, to his subordinates to appropriate to themselves or destroy their neighbor's property at pleasure, without any responsibility to any body—permits to trample on the Constitution aed sacred rights of the citizens—permits to destroy the foundation of the Government they claim to support, and establish on its ruins a military despotism in which every assumed military gentleman is an absolute tyrant. Such is not the law, It is in controvention of the common law rule as given by Chief Justice Taney and Judge Wilmot in the cases above referred to. This construction does violence to the intelligence of the conven-

tion that formed the Constitution, and establishes in the future a military despotism instead of a constitutional republican form of government, which, in the opinion of Chief Justice Taney, delivered in 7 Howard, U. S. R. 45, "it would be the duty of Congress to overthrow" under its constitutional power and duty to guarantee to each Strte a republican form of government. If the validity of this section is endorsed by this Court, then there is no security for life, liberty or property, for at any time, now or in the future, under the precedent established in this case any captain or lieutenant may, under any assumed pretext, destroy his neighbor's residence, and there is no redress, even though he may hold possession for all time to come, for the Court say in this case "that the subsequent detainder can afford no cause of action."

May it please the Court, this second section is only half the ordinance, and it is, perhaps, proper in conclusion to introduce the other half to this honorable Court as an apology for the action of the highest court of the State of Missouri, from whose decision my cliant has appealed to this Court, as his last hope of obtaining what he deems to be the ends of justice denied to him at his own domicil. The first section of this ordinance declares "That the offices of the Judges of the Supreme Courts, of all Circuit Courts and all Courts of Records," etc., etc. * * * "Shall be vacated on the first day of May, 1865, and the same shall be filled for the remainder of the term of each of said offices respectively, by appointment by the Governor."

The section further provides for the new appointee's taking the oath for officers, and then follows this second section which was plead in bar of this action.

The whole ordinance was complete in two sections; one swept out of existence all the judicial tribunals of the State, and in the same sentence created a new judiciary, whose sole authority rested upon the validity of the ordinance.

The other sectiun was as sweeping and conclusive of plaintiff's right of action, as the first was of judicial officers who could pass on its validity untrammelled.

The convention, it is evident, saw that this section was unconstitutional and would be so declared by the independent judiciary of the State, and hence, the necessity of creating a new

judiciary dependent upon this ordinance, who, in self-defense, could not declare it invalid, because such decission would sink the craft upon which their own judicial functions had embarked.

Such is the provisions of this remarkable ordinance, which we think belongs more properly to a former century. Many of its kindred provisions have been so consigned by this Court, in recent cases hailing from the same source, and my client humbly trust that he has not appealed to this final arbiter of his constitulional rights in vain.

IN THE

Supreme Court of the United States.

No. ——.—December Term, 1869.

HENRY DREHMAN,
Plaintiff in Error,
vs.
CHARLES G. STEIFEL.

Error to the Supreme Court of the State of Missouri.

Brief of Montgomery Blair *for Defendant.*

Statement.

On the 22d of September, 1863, the plaintiff, Drehman, brought an action of forcible entry and detainer against the defendant, before a justice of the peace, for a lot of ground in the city of St. Louis, and on the 31st of December obtained a judgment for the restitution of the premises, and the payment of five thousand dollars as damages. Defendant appealed to the circuit court, where, on the 3d of May, 1866, he obtained judgment against the plaintiff, which the supreme court, on 6th May, 1867, affirmed on appeal.—(43 Mo. Reps.)

The evidence showed that the plaintiff was in possession of the lot, under a lease from Mary Tyler for twenty years, dated in 1854, and that on or about the 15th of June, 1861, the defendant took the possession from him, and afterwards withheld it—the defendant being at the time colonel of the 5th regiment of the Missouri Home Guards, then in the service of the United States—and in taking possession of the lot acted in obedience to the orders of General Lyon, then commanding the troops in Missouri in the service of the United States. The defendant relied upon the 4th section of 11th article of Missouri constitution of 1865 for his defence. The section relied on is as follows:

"No person shall be prosecuted in any civil action or

'criminal proceeding for, or on account of, any act by 'him done, performed, or executed, after the first day of 'January, 1861, by virtue of military authority vested in 'him by the government of the United States, or that of 'this state, to do such act, or in pursuance of orders re- 'ceived by him from any person vested with such au- 'thority; and if any action or proceeding shall have 'heretofore been, or shall be hereafter, instituted against 'any person for the doing of any such act, the defendant 'may plead this section in bar thereof."

The circuit court and the supreme court of Missouri held that this section of the constitution barred the action of the plaintiff. The plaintiff in error sues out this writ to reverse this decision.

ARGUMENT.

The plaintiff in error insists that this section operates to forfeit his right without giving an opportunity to be heard in the judicial tribunals, and is, therefore, a bill of attainder, and also impairs the obligation of his contract with Mary Tyler.

This court, in Cummings vs. The State of Missouri, defines a bill of attainder to be "a legislative act which inflicts punishment without judicial trial." and an *expost facto* law to be "one which imposes a punishment for an act which was not punishable at the time it was committed, or imposes additional punishment to that then prescribed, or changes the rule of evidence by which less or different testimony is sufficient to convict than was then prescribed."

Punishment is the common object of bills of attainder and of *ex post facto* laws, and a legislative act in relation to past transactions which does not impose punishment, and is not an *ex post facto* law, is not a bill of attainder.

The section under consideration related to past acts, but cannot be considered a bill of attainder or an *ex post facto* law, unless its effect to take away a right of action makes it an act to inflict punishment.—(Lock vs. New

Orleans, 4 Wall., p. 172; Carpenter vs. Pa., 17 H., p. 456.)

In Calder vs. Bull, 3 Dall., p. 390, the court says the meaning of the prohibition against *ex post facto* laws is, "that the legislatures of the several states shall not pass laws after a fact done by a subject or citizen which shall have relation to said fact, and shall punish him for having done it. * * * I do not think it was intended to secure the citizen in his private rights of either property or contracts. * * * In my opinion the true distinction is between *ex post facto* laws and retrospective laws. Every *ex post facto* law must necessarily be retrospective; but every retrospective law is not an *ex post facto* law. The former only are prohibited. Every law that takes away or impairs vested rights agreeably to existing laws is retrospective, and is generally unjust, and may be oppressive; and it is a good general rule that a law should have no retrospect; *but there are cases in which laws may justly, and for the benefit of the community, and also of individuals, relate to a time antecedent to their commencement, as statutes of oblivion or of pardon.* They are certainly retrospective and literally both concerning and after the facts committed. But I do not consider any law *ex post facto* within the prohibition that mollifies the rigor of the criminal law; but only those that create or aggravate the crime, or increase the punishment, or change the rules of evidence for the purpose of conviction. Every law that is to have an operation before the making thereof, as to commence at an antecedent time, or to save time from the statute of limitations, or to *excuse* acts which were unlawful (at) and before committed, and the like, is retrospective. *But such laws may be proper or necessary,* as the case may be. There is a great and apparent difference between making *an unlawful act lawful* and the making an *innocent* action *criminal, and punishing it as such.* * * * The restraint against making any *ex post facto*

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